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IN THE SUPREME COURT FOR THE UNITED STATES

OCTOBER TERM, 1980

KEITH FAIR,
PETITIONER

Vs.

STATE OF GEORGIA,
RESPONDENT.

NO. 79-6884

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, KEITH FAIR, who is now held in the Georgia Diagnostic and Classification Center, Jackson, Georgia, moves this Honorable Court to grant him leave to file the attached petition for a writ of certiorari to the Georgia Supreme Court without prepayment of costs and to proceed in forma pauperis.

In support of this motion petititioner has attached as Appendix A to this motion an affidavit executed by petitioner on June 27, 1980.

In further support of this motion, petitioner has attached as Appendix B to this motion an affidavit executed by petitioner on September 13, 1979.

WHEREFORE, petitioner respectfully moves this Honorable Court to grant him leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed in forma pauperis.

Respectfully Submitted,

George W. Brinson

George W. Brinson
LEADING COUNSEL FOR PETITIONER

P.O. Box 430
Gainesville, Georgia 30503
Phone: (404) 536-0101

IN THE SUPREME COURT FOR THE UNITED STATES

OCTOBER TERM, 1980

KEITH FAIR, PETITIONER

Vs.

STATE OF GEORGIA, RESPONDENT.

CASE NO. 79-6884

PAUPER'S AFFIDAVIT

KEITH FAIR, being duly sworn, deposes and says:

1. I am a citizen of the United States and the petitioner in the above-entitled action.

2. Counsel was appointed to represent me on July 13, 1979, by the Hall County Superior Court.

3. I desire to petition this Court for a writ of certiorari to review the Judgment of the Georgia Supreme Court entered on April 9, 1980, rehearing denied April 29, 1980, but because of my poverty I am unable to pay the costs of such petition or give security therefor.

4. I believe that I am entitled to the redress I seek by such petition, and that such petition presents substantial federal questions.

The questions presented by such petition are as follows:

Whether, in affirming the trial court's refusal to allow petitioner to withdraw his plea of guilty prior

to pronouncement of sentence, the Georgia Supreme Court's novel construction of Georgia Code Annotated, Section 27-1404, which provides that an accused has an absolute right to withdraw his plea prior to pronouncement of sentence, has effectively denied petitioner equal protection and due process under the law in violation of the Fourteenth Amendment to the U.S. Constitution?

Whether the Georgia Supreme Court applied its novel construction of Georgia Code Annotated, Section 27-1404, in violation of the clause prohibiting ex post facto laws and in violation of petitioner's due process rights under the Fourteenth Amendment to the U.S. Constitution?

Whether, in affirming the imposition of the death sentence in petitioner's case, the Georgia Supreme Court adopted such a broad and vague construction of the Georgia Code Annotated, Section 27-2534.1(b)(7) aggravating circumstance as to violate the Eighth and Fourteenth Amendments to the U. S. Constitution?

Whether the death penalty imposed pursuant to the Georgia Code Annotated, Section 27-2534.1(b)(2) aggravating circumstance which provides, in part, that the offense of murder was committed while the offender was engaged in the commission of another capital felony, constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the U. S. Constitution where the petitioner is later acquitted of the underlying felony forming the basis of the statutory aggravating circumstance?

Whether the Georgia Supreme Court erred in affirming the trial court's order denying petitioner's motion to strike as unconstitutional the Georgia statute providing for the imposition of the death penalty?

I contend that the Georgia Supreme Court erred in affirming the trial court's refusal to allow me to withdraw my guilty plea, in affirming my death sentence, in upholding the constitutionality of Georgia's death penalty statute, and in applying its novel interpretation of a Georgia statute to my case retroactively.

WHEREFORE, affiant prays that he may have leave to proceed in this Court on petition for certiorari in forma pauperis.

Keith Fair
KEITH FAIR (By George W. Brinson with Express Permission)

Sworn to and subscribed before me
this 27 day of June, 1980.

Mary Moore
Notary Public

APPENDIX A

IN THE SUPERIOR COURT OF HALL COUNTY, GEORGIA

STATE,

Plaintiff

vs.

KEITH FAIR,

Defendant

CIVIL ACTION
FILE NO. _____

PAUPER'S AFFIDAVIT

Personally appeared before the undersigned officer, authorized by law to administer oaths, KEITH FAIR the DEFENDANT in the above styled case, and on oath says that HE is, because of HIS poverty, unable to pay the advance filing costs as required by Section 24-2727 of Georgia Code Annotated. This Pauper's Affidavit is in lieu of payment of costs as provided under Section 24-3405 of Georgia Code Annotated.

Keith Fair
Affiant

Sworn to and Subscribed before me this 13 day of Sept, 1977.

N.P.
State at Large, Georgia

APPENDIX B

CERTIFICATE OF SERVICE

I, GEORGE W. BRINSON, do hereby certify that I have furnished a copy of the within and foregoing Motion for Leave to Proceed In Forma Pauperis, by mail, to:

Honorable Jeff C. Wayne
District Attorney for the
Northeastern Judicial Circuit
P. O. Box 1690
Gainesville, Georgia 30503

and

Honorable Arthur K. Bolton
Attorney General, State of Georgia
132 State Judicial Building
Atlanta, Georgia 30303

in an envelope with sufficient postage thereon to carry same to its destination.

This 27 day of June, 1980.

George W. Brinson
George W. Brinson
LEADING COUNSEL FOR PETITIONER

JUN 30 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

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KEITH FAIR,

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Vs.

STATE OF GEORGIA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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IN THE SUPREME COURT FOR THE UNITED STATES

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NO. _____

KEITH FAIR,

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Vs.

STATE OF GEORGIA,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

The Petitioner, Keith Fair, respectively prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Georgia entered in this proceeding on April 9, 1980.

OPINION BELOW

The Opinion of the Supreme Court of Georgia is to-date unpublished but the Slip Opinion appears in the Appendix hereto.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on April 9, 1980, affirming petitioner's conviction and sentence of death dated August 15, 1979. A timely petition for rehearing was denied on April 29, 1980. This petition for

certiorari was filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

Whether, in affirming the trial court's refusal to allow petitioner to withdraw his plea of guilty prior to pronouncement of sentence, the Georgia Supreme Court's novel construction of Georgia Code Annotated, Section 27-1404, which provides that an accused has an absolute right to withdraw his plea prior to pronouncement of sentence, has effectively denied petitioner equal protection and due process under the law in violation of the Fourteenth Amendment to the U. S. Constitution?

Whether the Georgia Supreme Court applied its novel construction of Georgia Code Annotated, Section 27-1404, in violation of the clause prohibiting ex post facto laws and in violation of petitioner's due process rights under the Fourteenth Amendment to the U. S. Constitution?

Whether, in affirming the imposition of the death sentence in petitioner's case, the Georgia Supreme Court adopted such a broad and vague construction of the Georgia Code Annotated, Section 27-2534.1(b)(7) aggravating circumstance as to violate the Eighth and Fourteenth Amendments to the U. S. Constitution?

Whether the death penalty imposed pursuant to the Georgia Code Annotated, Section 27-2534.1(b)(2) aggravating circumstance which provides, in part, that the offense of murder was committed while the offender was engaged in the commission of another capital felony, constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the U. S. Constitution where the petitioner is later acquitted of the underlying felony forming the basis of the statutory aggravating circumstance?

Whether the Georgia Supreme Court erred in affirming the trial court's order denying petitioner's motion to strike as unconstitutional the Georgia statute providing for the imposition of the death penalty?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOKED

The Constitutional and statutory provisions are as follows:

United States Constitution, Eighth Amendment:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

United States Constitution, Fourteenth Amendment:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person without its jurisdiction the equal protection of the laws.

United States Constitution, Art. I, Sec. 9, Cl. 3:

> No Bill of Attainder or ex post facto Law shall be passed.

Ga. Code Ann. §27-2534.1(b)(2):

> (b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:
>
> (2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

Ga. Code Ann. §27-2534.1(b)(7):

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

Ga. Code Ann. §27-1404:

Upon the arraignment of a prisoner, the indictment shall be read to him, and he shall be required to answer whether he is guilty or not guilty of the offense charged in the indictment, which answers or plea shall be made orally the prisoner or his counsel. If he shall plead "guilty," such plea shall be immediately recorded on the minutes of the court by the clerk, together with the arraignment; and the court shall pronounce upon such prisoner the judgment of the law, in the same manner as if he had been convicted of the offense by the verdict of a jury; but, at anytime before judgment is pronounced, the prisoner may withdraw the plea of "guilty," and plead "not guilty," and such former plea shall not be given in evidence against him on his trial.

STATEMENT OF THE CASE

The petitioner, Keith Fair, was indicted in the Superior Court of Hall County, Georgia, for the murder of Jackie Morris. On August 13, 1979, the petitioner pled guilty to the murder and submitted the issue of punishment to the trial judge without a jury. On August 15, 1979, the trial judge refused petitioner's withdrawal of his guilty plea and sentenced the petitioner to death for the murder of Jackie Morris (T-484, 487, 490, 491).

On the night of the incident giving rise to the charge, May 8, 1979, petitioner and Becky Nations were riding

around drinking and stopped at Dexter Thomas' house (T-407). Petitioner had been drinking quite a bit and, in fact, had consumed over a quart of Canadian Mist liquor (T-407). As the evening wore on a number of people congregated at Thomas' house including the Hall County victim, Jackie Morris, and Edmond Hoyt "Beetle" Turner, the Habersham County victim. "Beetle" had come in mad waving some bonds where he had gotten out of jail (T-193). As it turned out, "Beetle" was mad at Morgan Whitlock who owned a trailer in Banks County and who had had "Beetle" put in jail. Prior to arriving at Dexter Thomas' house, "Beetle" had been by Whitlock's and threatened him and told Whitlock he would be back that night (T-96-98).

Once they were all together at Thomas' house - Thomas, petitioner, "Beetle" (Habersham County victim) and Morris (Hall County victim) left in Morris' car to get some more liquor (T-194). Although four men left in Morris' (victim) car, only three came back (T-249). "Beetle" Turner was missing (T-249). Petitioner was indicted in Habersham County for the murder of "Beetle" Turner. On November 16, 1979, a Habersham County jury of twelve found petitioner <u>not guilty</u> of the murder of "Beetle" Turner. A certified copy of the indictment and verdict appears in the Appendix hereto. Virtually the exact same evidence that was presented before the trial judge in Hall County was presented in the Habersham County trial. Petitioner's counsel, as well as petitioner's Habersham County counsel, strenuously objected in the Hall County trial (victim Morris) to any and all evidence concerning petitioner's activities in Habersham County (T-124, 128, 161, 167, 200, 252, 292, 332, 359, 426, 432, 433, 437, 439, 441, 454). The basis for petitioner's objections, of course, was that the proper forum (Habersham County) to adjudicate petitioner's guilt or innocence for the murder of "Beetle" Turner had yet to decide such critical issues.

The question remained about what the group would do with the blood stained back seat of Morris' (victim) car where "Beetle" had been slain. Later in the evening on May 8, 1979, petitioner, Nations, Morris (victim), Thomas and Sherrill Land met at a Huddle House (short order restaurant) in Gainesville, Georgia (T-408, 409). Petitioner left the Huddle House and went to Bradley Highfield's house to borrow Highfield's car because petitioner's car was not operating properly (T-409, 410). Petitioner continued to drink throughout the entire evening (T-413).

By the time petitioner returned to the Huddle House, Morris (victim), Thomas and Land had already left (T-410, 411). Petitioner, Nations and Highfield subsequently re-established contact with Morris (victim), Thomas and Land (T-411).

Petitioner and the entire group then went to a dirt road in Hall County, Georgia, to burn Morris' (victim) car (T-412). Morris (victim) wanted to take a wheel off so he could report the soon to be burned car stolen (T-212). During the discussions with respect to the burning of Morris' (victim) car, petitioner and Morris began arguing "real heavy" and petitioner shot Morris (T-414). The State's expert witness, Dr. Dawson, a pathologist, recovered three bullets from the head of Morris (T-127). Dr. Dawson testified that he saw no evidence or other findings that would be consistent with a torture of the victim Morris (T-145). Such fact was conceded by the State (District Attorney's Brief, p. 24). Further, the Hall County trial judge in his report for use on appellate review responded negatively to the question on whether or not the victim had been "physically harmed or tortured? (R-98).

After Morris had been shot, petitioner and Thomas placed Morris' body in Morris' car and Thomas set fire to the car (T-416, 417). Highfield then took petitioner, Thomas, Land

and Nations home (T-417). All persons in Highfield's car were of the opinion that nothing should be said about what had occurred on that dirt road in Hall County (T-418).

When petitioner's case was called for trial, petitioner announced that he wanted to plead guilty to the murder of Morris and leave the matter of sentencing to the trial court sitting without a jury (T-3-21). After examining the petitioner, the trial court was satisfied and accepted the plea (T-19). In entering the plea of guilty, petitioner had been asked why he had killed Morris. Petitioner replied, "I don't know, it just happened all of a sudden. We was pretty drunk and we had a little argument, and I don't know what happened" (T-15).

After the sentence hearing and a night's deliberation, the trial judge orally announced that the death penalty would be imposed and petitioner immediately withdrew his plea of guilty orally and by written withdrawal (T-484, 487; R-9-22). Both the oral and written withdrawals were accomplished prior to the trial judge handing the sentence to the Clerk (T-490). However, the trial court refused petitioner's timely withdrawal (T-491). The Court's ruling was affirmed on appeal on the novel ground that no such right existed in capital felony cases.

Petitioner appealed his "conviction" and sentence to the Georgia Supreme Court on ten enumerations of error. The refusal by the trial court of petitioner's withdrawal of guilty plea and sentence was affirmed. Fair v. State, Supreme Court Case No. 35701, decided April 9, 1980; Petitioner's Motion for Rehearing before the Georgia Supreme Court was denied on April 29, 1980.

Because of the substantial constitutional claims raised by this proceeding, petitioner has invoked the jurisdiction of this Court under 28 U.S.C. §1257(3) to review the judgment of the Court below.

REASONS FOR GRANTING THE WRIT

1. The Court below bases its approval of the trial court's refusal to permit petitioner to withdraw his plea of guilty prior to sentence pronouncement on the novel ground that Ga. Code Ann. §27-1404 does not apply in capital felonies (except treason and aircraft highjacking). Certiorari should be granted because such novel construction effectively denies petitioner equal protection and due process under the law in violation of the Fourteenth Amendment to the U. S. Constitution.

The equal protection provision of the Fourteenth Amendment to the U. S. Constitution applies to, and may be violated by, State action of every kind, including judicial action, at least insofar as unjust discrimination is concerned. Shelley v. Kraemer, U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161.

A statute constitutional on its face may in the context of a given fact situation be applied unfairly or for a discriminatory purpose in violation of the equal protection clause of the Fourteenth Amendment. U.S. v. Scotland Neck City Board of Education, 442 F.2d 575 (4th Cir. 1971).

"Our own constitutional guaranties of due process and equal protection both call for procedures which allow no invidious discrimination between persons and different groups of persons. Both equal protection and due process emphasize the central aim of our entire judicial system - all people charged with crime must, sofar as the law is concerned, stand on an equality before the bar of justice in every American court". Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1955).

At least one Circuit has held that equal protection of the laws includes the right to be tried in the same manner as others

accused of crime are tried. Lynch v. United States, 189 F.2d 476 (5th Cir. 1951).

Thus, it deserves little argument that petitioner here has been effectively denied due process and equal protection under the law. For the past thirty-five years the law in Georgia made no distinction between which defendants have the absolute right to withdraw their guilty pleas under Code Section 27-1404. For the past thirty-five years the law in Georgia has been that a defendant has the absolute right to withdraw his guilty plea prior to sentence pronouncement and that pronouncement consists of the signing of the written sentence by the presiding judge and its delivery to the Clerk for record. Clark v. State, 72 Ga. App. 630, 34 S.E.2d 608 (1945); Wright v. State, 75 Ga. App. 764, 44 S.E.2d 569 (1947). In Georgia the right to withdraw a guilty plea prior to pronouncement has long been held to be a procedural right "without qualification" guaranteeing "to all persons charged with crime a trial by jury." Ga. Code Ann. §27-1404; Woodward v. State, 13 Ga. App. 130, 178 S.E. 1009 (1913); Burkett v. State, 131 Ga. App. 177, 205 S.E.2d 496 (1974).

It is not disputed, nor could it be, that petitioner effectively withdrew his guilty plea in accordance with Ga. Code Ann. §27-1404. However, in an effort to avoid frustrating the electrocution of a criminal defendant, the Georgia Supreme Court adopted the unpredictable and novel position that a guilty plea may not be withdrawn as a matter of right in capital cases (except treason or aircraft highjacking). "Furthermore, to apply Code Ann. §27-1404 to such a situation would frustrate the purpose of Georgia Laws 1973, pp. 159, 171, in that the plea could be withdrawn as a matter of right after the defendant learns a death sentence has been announced. Therefore, under this construction a death sentence could never be imposed upon a guilty plea if the defendant wished to avoid it". Fair v. State, Slip Opinion, p. 17. Note the obvious concern of the

Georgia Supreme Court that death penalties be imposed.

The Georgia Supreme Court reached their alarming conclusions by holding that petitioner's case was one of first impression and that Georgia's new death penalty act, Georgia Laws 1973, pp. 159, et seq., "created a comprehensive new procedure for the trial and imposition of the death penalty in capital felony cases". Unfortunately, no one bothered to inform petitioner nor his counsel, or for that matter, any other member of the State Bar of Georgia, that Georgia Laws 1973, pp. 159, et seq., had repealed, or at least modified, the vested, substantive and procedural right found in Code Section 27-1404. This Court stated in Bouie v. City of Columbia, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964), that "When a State Court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law, 'in its primary sense of an opportunity to 'be heard and to defend [his] substantive rights'." Citing Brinherhoff-Faris Trust and Savings Co. v. Hill, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107.

In effect, the Georgia Supreme Court by its holding legislates that capital defendants have less rights than noncapital defendants and misdemeanants. Petitioner submits that there is no meaningful distinction between capital defendants and noncapital defendants and misdemeanants such that would permit the discrimination authorized by the Georgia Supreme Court with regard to who is able to utilize the right to withdraw under Code Section 27-1404. Petitioner, who was not able to foresee the new ruling by the Georgia Supreme Court, literally staked his life on precedent. The holding of the Georgia Supreme Court denies petitioner a substantive and procedural right heretofore guaranteed by the laws of the State of Georgia,

creates and places petitioner in a class for which there is no rational basis, and effectively denies petitioner of equal protection and due process of law as guaranteed under the Fourteenth Amendment to the U. S. Constitution.

2. The application to petitioner's case of the novel construction of the Court below that Georgia Code Annotated, Section 27-1404, does not apply in capital felony cases (other than treason or aircraft highjacking) violates the prohibition against ex post facto laws and effectively denies petitioner due process of law as guaranteed by the Fourteenth Amendment to the U. S. Constitution.

In the instant decision the Georgia Supreme Court seeks to revoke the right of the petitioner to withdraw his guilty plea prior to pronouncement on the alarming grounds that it does not apply to capital offenses. What is more, the Supreme Court intends to retroactively apply this rationale to the petitioner's case, thus denying his attorneys the opportunity to adequately counsel the defendant with regard to the consequences of his plea when entered. This Court stated in Bouie v. City of Columbia, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964), that "When a State Court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law, 'in its primary sense of an opportunity to be heard and to defend [his] substantive rights'." Citing Brinherhoff-Faris Trust and Savings Co. v. Hill, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107).

Applying this rationale to the instant decision it is easy to graps the fundamental fairness of a rule which prohibits State Courts from juggling their laws in an unpredictable and

inconsistent fashion to the prejudice of federal constitutional rights. Wright v. Georgia, 373 U.S. 284, 291, 83 S.Ct. 1240, 10 L.Ed2d 349; N.A.A.C.P. v. Alabama, 357 U.S. 449, 456-458, 78 S.Ct. 1163, 2 L.Ed.2d 1488. At the time that the petitioner entered his plea it was uppermost in his mind that he had a right to withdraw this plea after sentencing but prior to the pronouncement. Petitioner could and would have been foolish not to take two bites at the apple in the fervant hope of preserving his own life. In fact, the best legal advice that could be given at the time the Petitioner entered his plea could not have and did not anticipate the bizzarre grounds the Supreme Court found for not applying this long standing procedural right to capital cases.

Any change in judicial interpretation at this point would take from petitioner a substantial right given to him by law in force at the time his plea was entered, and such an interpretation would have the effect of an ex post facto law in contravention of the Constitution of the State of Georgia (Art. I, Sec. I, Par. VII; Ga. Code Ann. 2-107) and the U.S. Constitution (Art. I, Sec. 9, Cl. 3). The Georgia Supreme Court recognized in Winston v. State, 186 Ga. 573, 196 S.E. 667 (1938):

> "Any law is ex post facto which is enacted after the offense was committed, and which, in relation to it or its consequences, alters the situation of the accused to his disadvantage." 186 Ga. at 574-575 (emphasis added).

While this language relates to a statutory enactment, there is no distinguishable difference between a new enactment which changes a defendant's rights and the abrogation of a long-standing and well-settled principle of judicial interpretation

(which, of course, has the practical effect of being a new statutory enactment).

In Todd v. State, 228 Ga. 746, 187 S.E.2d 831 (1971), The Georgia Supreme Court approved the following language from the California Supreme Court calling it a ruling of "decisive importance":

> "[A]ny law... is an ex post facto law when it... alters the situation of the accused to his disadvantage..." 228 Ga. at 751 (emphasis added).

Thus, the test adopted by the Georgia Supreme Court is one which measures the consequences of a later act; or how it alters the defendant's situation. Certainly, the consequences of any judicial reinterpretation of this statute on the petitioner are drastic indeed. Will petitioner be disadvantaged by any rein-interpretation? Obviously. Petitioner respectfully submits that any change in the law with respect to the withdrawal of guilty plea should be applied prospectively only and not retro-actively.

3. The holding of the Court below applies an unconstituional construction of the Georgia (b)(7) aggravating circumstance insofar as said holding of the Georgia Supreme Court requires the State to show no more than an "outrageously or wantonly vile, horrible and inhuman act" committed by an accused with a "depraved mind". Certiorari should be granted because this raises the same question as was raised in Godfrey v. Georgia, U.S. Supreme Court Case No. 78-6899, decided May 19, 1980, 48 USLW 4541.

Godfrey, supra, mandates that the facts of any death case must provide fair evidentiary support for a finding that it falls

within the narrow construction of Section (b)(7). A finding without fair support in the record is by definition arbitrary and capricious, Schware v. Board of Bar Examiners, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957), and cannot supply any "principled way to distinguish [a]. . . case, in which the death penalty was imposed, from the many cases in which it was not." 48 USLW at 4545. Where federal rights are at stake, factual findings upon which their denial turns are subject to plenary and independent federal review on appeal. See, e.g., Edwards v. South Carolina, 372 U.S. 229, 235, 83 S.Ct. 680, 9 L.Ed.2d 697 (1963); Haynes v. Washington, 373 U.S. 503, 513-516, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963), and cases cited.

The lack of factual support for a properly limited construction of Section (b)(7) is apparent in petitioner's case from the testimony of Dr. Byron Dawson, pathologist at the Georgia State Crime Lab (T-145):

> "Q. Dr. Dawson, I asked you whether or not in your autopsy of Jackie Morris, and in your medical opinion, and from your experience as a pathologist whether or not you found any evidence whatsoever of torture, and I believe that your response was that you did not find any such evidence, is that correct?"
>
> "A. That's correct, again with the qualification that were there or had there been injuries which were destroyed by the fire then that would be a different story, but withstanding those -- or imposing that qualification the answer

is -- well, I forget now how you phrased it, but the answer is that I saw no evidence that would be . . or, no injuries, or other findings that would be consistent with a torture."

Dr. Dawson testified further that although the body of Jackie Morris had been burned, that this was done after death and therefore could not be considered a torture to the victim or aggravated battery (T-143). Dawson's testimony further raised the reasonable conclusion that although Morris was shot at least three times, two shots were fired in the head of the victim and that if either of those two shots were fired first, the victim was rendered unconscious rapidly and had no conscious sense of further pain (T-136, 137, 143-144). The State having the burden of showing the existence of this aggravating circumstance beyond a reasonable doubt, the evidence failed to exclude the reasonable hypothesis that Morris was shot in the head initially and thereafter had no conscious pain or suffering, regardless of subsequent shots or the like. The fact that no physical suffering or torture was involved in petitioner's case was conceded, or at least not contested, by the State (District Attorney's Brief, p. 24). Further, the Hall County trial judge in his report to the appellate courts responded negatively to the question on whether or not the victim had been "physically harmed or tortured" (R-98).

In Harris v. State, 237 Ga. 718 (732-733), 230 S.E.2d 110-111 (1976), the Georgia Supreme Court held that this aggravating circumstance (Section (b)(7)) involves both the effect on the victim, viz., depravity of mind. As to both parties the test is that the acts (the offense) were "outrageously or wantonly vile, horrible or inhuman" (Emphasis added).

Subsequently, in Blake v. State, 239 Ga. 292, 236 S.E.2d 637 (1977), the Georgia Supreme Court held that the depravity of mind contemplated by the statute (Section (b)(7)) is that which results in torture or aggravated battery to the victim. 239 Ga. at 299, 236 S.E.2d at 643. That is to say, that the word "torture", must be construed in para materia with "aggravated battery" so as to require evidence of serious physical abuse of the victim before death.

It rapidly becomes apparent that the circumstances of petitioner's case do not satisfy the criteria laid out by the Georgia Supreme Court itself in the Harris and Blake cases. Any attempt by the Georgia Supreme Court in their Addendum Opinion dated June 24, 1980, to justify their decision in petitioner's case in light of Godfrey is misplaced insofar as the distinction drawn in Godfrey is not between murders and "ordinary murders." See Addendum Opinion, pp. 1 and 2 (Appendix). Thus, in light of the U. S. Supreme Court's recent decision in Godfrey v. Georgia, 48 USLW 4541 (May 19, 1980), the Georgia Supreme Court has adopted such a broad and vague construction of the Section (b)(7) aggravating circumstance as to violate the Eighth and Fourteenth Amendments to the U. S. Constitution.

4. This Court should grant certiorari because the decision below approves the imposition of the death penalty based on a felony for which the accused is later acquitted. Such construction of Ga. Code Ann. §27-2534.1(b)(2) violates the Eighth and Fourteenth Amendments to the U. S. Constitution.

Death as a punishment is unique in its severity and irrevocability. Gregg v. Georgia, 428 U.S. 153, 187; Furman v. Georgia, 408 U.S. 238, 286-291. Because it is the most

extreme of sanctions, it must be reserved for the most extreme of crimes.

In sentencing petitioner in this case, the trial court recommended death in that the murder of Jackie Morris was committed while in the commission of another capital felony, to-wit: the murder of Edmond Hoyt "Beetle" Turner in Habersham County, Georgia (T-492-494).

However, as is shown by the verdict attached to the Appendix hereto, petitioner subsequently went to trial for the murder of Turner and was acquitted. Thus, the underlying felony which was the basis of the aggravating circumstance justifying the death sentence in petitioner's case can no longer serve as the springboard for a death sentence.

In its death penalty scheme (Ga. Code Ann. §27-2534.1) the legislative specification of a capital felony as an aggravating circumstance is plain, viz: there must be a nexus between the elements of a capital felony performed by the defendant and the murder in question. The subject crime must be done "while the offender was engaged in the commission of another capital felony... ." (Emphasis added). The language of the statute itself requires that the underlying felony be committed by "the offender". Since the death penalty is the most serious punishment a State may impose; it would be antithetical to the finality of this punishment and the obvious intent of the legislature to allow a State to use this statutory circumstance as an excuse rather than a justification for imposition of the death penalty.

The Georgia Supreme Court misconstrued Hooks v. State, 233 Ga. 149, 210 S.E.2d 668 (1974), in holding that the subsequent acquittal of petitioner in Habersham County simply had no bearing on the issue of whether the trier of fact was

was presented with sufficient evidence to find beyond a reasonable doubt and the existence of an aggravating circumstance. It is true that Hooks stands for the rule that it is not required that a defendant be convicted of the crime introduced as an aggravating circumstance. However, it is readily apparent that a lack of conviction is entirely different from an acquittal! An acquittal is defined as "the legal and formal certification of the innocence of a person who has been charged with crime", Black's Law Dictionary, Fourth Edition.

This Court held in Cole v. Arkansas, 333 U.S. 196, 68 S.Ct. 514, 92 L.Ed. 644 (1948), that it was as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made.

The rule in Cole, supra, was followed as recently as 1978, in Presnell v. Georgia, 439 U.S. 14, 99 S.Ct. 235, 58 L.Ed.2d 207 (1978). In Presnell, the Georgia Supreme Court held that the State could not rely upon sodomy as constituting the bodily injury associated with kidnapping. Nonetheless, despite the fact that the jury had been instructed that the death penalty for murder depended upon a finding that it was committed while petitioner was engaged in "kidnapping with bodily injury, aggravated sodomy" the Georgia Supreme Court upheld the third death penalty imposed by the jury. It did so on the theory that, despite the lack of a jury finding of forcible rape, evidence in the record supported the conclusion that petitioner was guilty of that offense, which in turn established the element of bodily harm necessary to make the kidnapping a sufficiently aggravating circumstance to justify the death sentence. The actions of the Georgia Supreme Court in Presnell violated petitioner's due process rights.

In a similar fashion as in Presnell, the Georgia Supreme Court has violated this petitioner's due process rights. The rule espoused in Cole and Presnell can be logically extended so as to apply to this petitioner's situation: "It is as much a due process violation to send an accused to death based on a charge for which he was acquitted as it would be to send an accused to prison following conviction of a charge on which he was never tried or to convict him upon a charge that was never made." Cole v. Arkansas, supra, and particularly Presnell v. Georgia, supra, bear directly on petitioner's case and command a finding by this Court that petitioner's due process rights were violated thereby rendering the death sentence imposed unconstitutional.

Further, imposition of the death penalty based on the Section (b)(2) aggravating circumstance would be cruel and unusual in that the death penalty would be excessive, disproportionate and arbitrary. The U.S. Supreme Court has devoted consideration to such criteria with respect to the determination of whether a particular punishment is "cruel and unusual". In Rudolph v. Alabama, 375 U.S. 889, 84 S.Ct. 155, 11 L.Ed.2d 119, Reh. den. 375 U.S. 719, 84 S.Ct. 204, 11 L.Ed.2d 158, in a dissenting opinion from the denial of a petition for certiorari, Justices Goldberg, Douglas and Brennan expressed the view that among the criteria to be considered in determining whether a punishment was cruel and unusual were whether the punishment, by its excessive severity, was greatly disproportionate to the offense charged; whether the permissible aims of punishment, such as deterrents, isolation, and rehabilitation, could be achieved as effectively by punishing an offense less severely; and whether, if the permissible aims of punishment could be achieved as effectively by punishing an offense less severely. In opinions by several members of the Court, in Furman v. Georgia, supra, attention was devoted to the question whether punishment

was inflicted arbitrarily.

If appellate review is to be effective in guarding against the arbitrariness in administration that the controlling opinions in Furman decided made the death penalty statutes of 1972 unconstitutional, a Court considering or reviewing the appropriateness of the death sentence must be in a position to evaluate the factors relied upon in reaching the death sentence. In petitioner's case, it is now impossible to perform this duty. This Court, as the Georgia Supreme Court could not, cannot know the extent to which the trial court was influenced by what it obviously assumed was petitioner's guilt for the murder of "Beetle" Turner in Habersham County. Stated more generally, the Georgia Supreme Court was not in a position to fulfill the duty of careful appellate review because there was an unresolved "critical issue in the punishment phase of the trial", Green v. Georgia, 99 S.Ct. 2150, 2651, i.e., whether petitioner had actually participated in and was responsible for the death of Edmond Hoyt "Beetle" Turner. Each and every factor contributing to the finding of an aggravating circumstance may tip the delicate balance between life and death; and, if a death sentence is returned, the part played in it by any single factor which the trier of fact found in this case "can only be the subject of sheer speculation." Godfrey v. Georgia, 48 USLW 4541, 4544 (May 19, 1980).

Should death sentences be upheld on the basis of underlying felonies for which the defendant is later acquitted, a substantial risk develops that the death penalty will be imposed arbitrarily and capriciously on any defendant who is charged with more than one felony arising out of a homicide. This risk of capriciousness was especially highlighted in petitioner's case, and, in fact, the risk became incredulous reality for the petitioner.

The Georgia Supreme Court attempts to justify their alarming decision in their addendum opinion by citing this Court's decision in Standefer v. U.S., 48 USLW 4634 (June 9, 1980). The Georgia court's emphasis is misplaced for multiple reasons. The most important distinctions are that in petitioner's case we are not dealing with an accessory and his principal (two defendants), but one (petitioner), and in petitioner's case we are dealing with a man's life and not a revenue violation.

5. This Court should grant certiorari to consider whether the Georgia statute providing for the imposition of the death penalty violates the Eighth and Fourteenth Amendments to the U.S. Constitution.

The Georgia statute providing for the imposition of the death penalty should be quashed and held unconstitutional in that it is applied in a way that violates the constitutional prohibition against the use of cruel and unusual punishment in violation of the Eighth and Fourteenth Amedments to the U.S. Constitution and the rule of law espoused and mandated in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

Georgia Laws 1973, pp. 159, 163 (Ga. Code Section 27-2534.1) is discretionary and is applied discriminatorily against classes of defendants in violation of the due process and equal protection clauses of Art. I, Sec. I, Pars. II and III, of the Georgia Constitution (Ga. Code Section 2-102) and of the Fourteenth Amendment to the U.S. Constitution.

The categories of aggravating circumstances in Georgia Laws 1973, pp. 159, 163 (Ga. Code Section 27-2534.1) are applied in an unreasonable and arbitrary manner in violation

of the equal protection clause of Art. I, Sec. I, Par. II, of the Georgia Constitution (Ga. Code Section 2-102) and of the Fourteenth Amendment to the U.S. Constitution.

Georgia Laws 1974, pp. 352, 353 (Ga. Code Section 27-2302) allows subjective discretion in applying the death penalty in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution.

Georgia Laws 1973, pp. 159, 165 (Ga. Code Section 27-2537(f)) provides for the collection of data on sentences imposed in capital felony cases after January 1, 1970, for purposes of reviewing death sentences as excessive, disproportionate or arbitrary. The statutory check against the arbitrary and discriminatory application of the death penalty is not being complied with, thereby depriving defendants' sentences to death of an effective or adequate review of their sentence in violation of due process of law.

Georgia Laws 1973, pp. 159, 163 (Ga. Code Section 27-2534.1) is applied arbitrarily and discriminatorily against certain classes of defendants in violation of the due process and equal protection clauses of Art. I, Sec. I, Pars. II and III of the Georgia Constitution (Ga. Code Sections 2-102, 2-103) and the Fourteenth Amendment to the U.S. Constitution, in that the Georgia Supreme Court compares death cases only with those cases in which a death sentence has been received and in which it has upheld that death sentence.

Georgia Laws 1973, pp. 159, 163 (Ga. Code Section 27-2534.1) is applied arbitrarily and discirminatorily against certain classes of defendants in violation of the due process and equal protection clauses of Art. I, Sec. I, Pars. II and III of the Georgia Constitution (Ga. Code Sections 2-102, 2-103) and the Fourteenth Amendment to the U.S. Constitution, and in violation of the United States Supreme Court's mandate in

Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 849 (1976), in that the Georgia Supreme Court does not submit written findings comparing cases in which it reviews death sentences with similar cases, but merely lists other cases and states that it has made the required comparison. Such a procedure prohibits a defendant from challenging the affirmation of his/her death sentence as arbitrary and discriminatory, because the defendant is given no notice as to which permissible factors the Court has used in such comparison.

The thrust of the United States Supreme Court's decision in Gregg v. Georgia, supra, in upholding Georgia's post-Furman capital punishment statute was the availability of meaningful, informed appellate review of death sentences. The reviewing court must be in a position to evaluate the factors relied upon by the trial court in reaching the death verdict. The Georgia Supreme Court blithely rejects the notion that petitioner's subsequent acquittal of the murder of "Beetle" Turner "has no bearing on the issue" of whether the trial court could consider the Habersham County "evidence" in reaching his sentencing decision. Neither the sentencing Court nor the Georgia Supreme Court was in a position to fulfill its duty of careful appellate review because there is and was an unresolved "critial issue in the punishment phase of the trial" (Green v. Georgia, _____U.S._____, 99 S.Ct. 2150, 2651, 60 L.Ed.2d 738, to-wit: the unresolved killing of "Beetle" Turner in Habersham County for which the petitioner has been certified as innocent of said crime.

Moreover, the cases cited in the Appendix to the Georgia Supreme Court opinion illustrate the lack of meaningful review. The cases cited are not all post-Section 27-2528 cases, nor do they deal with the factual or legal issues before the Court. The cases considered by the Georgia Supreme Court under

Ga. Code Ann. §27-2537 are neither similar nor do they address the issues presented to the Georgia Supreme Court. Lack of meaningful review deprived petitioner of his rights under both the U.S. and Georgia Constitutions.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Georgia.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, GEORGE W. BRINSON, do hereby certify that I have furnished a copy of the within and foregoing Petition for Writ of Certiorari to the Supreme Court of Georgia, by mail, to:

Honorable Jeff C. Wayne
District Attorney for the
Northeastern Judicial Circuit
P. O. Box 1690
Gainesville, Georgia 30503

and

Honorable Arthur K. Bolton
Attorney General, State of Georgia
132 State Judicial Building
Atlanta, Georgia 30303

in an envelope with sufficient postage thereon to carry same to its destination.

This 27 day of June, 1980.

George W. Brinson
George W. Brinson
LEADING COUNSEL FOR PETITIONER

APPENDIX

In the Supreme Court of Georgia

Decided: APR 09 1980

35701. FAIR v. STATE

BOWLES, Justice.

Keith Fair, the appellant, pled guilty in the Superior Court of Hall County to the murder of Jackie Morris. The trial judge, after a two day pre-sentence trial, found the existence of two statutory aggravating circumstances and imposed the death penalty. The case is here on direct appeal.

This case involves two killings by appellant. The trial judge, as the finder of fact, was authorized to find that the first killing occurred in Habersham County as a result of a dispute over a money matter. Apparently the Habersham County victim had hired appellant to burn a trailer for him and then did not have the money to pay. In front of his other accomplices, including Jackie Morris, hereinafter the Hall County victim, appellant shot the Habersham County victim at point blank range in the face, then threw him on the ground and shot him again, laughing all the while. The body was disposed of in Lake Lanier.

Later that night, appellant determined that the Hall County victim would have to be killed as well since he had been a "rat" in prison. Appellant pretended to need help with a wheel on an automobile and when the victim leaned over to help, appellant shot him in the head, laughing and saying, "you wasn't nothing but a rat you son-of-a-bitch no way, you pulled a knife on me when I was thirteen years old and scared the hell out of me." The body was placed in the car; the victim's throat was cut by another accomplice; and the car was set on fire.

After his arrest, the appellant bragged about the killing of the Hall County victim to other inmates. He also stated that when he got out he was going to kill the other witnesses. In conversation with other inmates he said that he was not sorry about the killing and did not lose any sleep over it. Appellant escaped from jail with another inmate to whom he admitted both killings. During the period he was a fugitive, he told the inmate he escaped with that the victims were criminals like him and deserved it but that he did not want to be shot because when he shoots people they "squeal like it hurts." Appellant was re-captured within a day and a half.

1. The appellant attacks the constitutionality of the Georgia Death Penalty Statute, Ga. Laws, 1973, pp. 159, et. seq. (Code Ann. § 27-2634.1) as written and applied. Both this court and the Supreme Court of the United States have upheld the constitutionality of the Georgia statute in a number of cases and appellant has advanced no new reason for us to reconsider our position. See Gregg v. Georgia, 428 U. S. 153 (1976); Eberheart v. State, 232 Ga. 247 (206 SE2d 12) (1974); McCorquodale v. State 233 Ga. 369 (211 SE2d 517) (1974); Smith v. State, 236 Ga. 12 (222 SE2d 308) (1976); Mason v. State, 236 Ga. 46 (222 SE2d 339) (1976); Birt v. State, 236 Ga. 815 (225 SE2d 248) (1976); Legare v. State, 243 Ga. 744 (257 SE2d 247) (1979). Appellant's first enumeration of error is without merit.

2. The appellant in his second enumeration of error argues that the trial court erred in admitting evidence of the murder of the Habersham County victim and relying upon that evidence in its finding of one of the statutory aggravating circumstances warranting the death penalty.

Appellant was given proper notice that the evidence of the Habersham County murder would be tendered in aggravation. At the

pre-sentence trial, his appointed attorney in the Habersham County case advised appellant to assert his Fifth Amendment privilege as to any question concerning the first murder. However, this in itself would not have prevented appellant from presenting evidence in defense of the Habersham County murder before the trial court in the instant case. The appellant had to choose which course to follow. Though a defendant may have a right, even a constitutional right to follow a certain course of action, it does not necessarily follow that to require him to choose a course of action is constitutionally forbidden. Decisions as to what course to follow in a criminal case are many times difficult. See McMann v. Richardson, 397 U. S. 759 (1970). The appellant contends that the evidence of the Habersham murder should not have been introduced against him in aggravation because he had only been charged with that murder, had not been convicted, but was awaiting trial thereon. It is the rule in this state that it is not required that a defendant be convicted of the crime introduced as an aggravating circumstance. Hooks v. State, 233 Ga. 151 (210 SE2d 688) (1974); Collier v. State, 244 Ga. 553 (261 SE2d 364) (1979). Appellant's reliance upon Code Ann. § 27-2534.1(b)(1) is

misplaced in that the record clearly shows that the state relied upon and the trial court found that the murder occurred during the commission of another capital felony. Code Ann. § 27-2534.1 (b) (2).

Appellant further argues that the evidence was totally irrelevant and, therefore, inadmissible. We do not agree. The first murder was committed within hours of the second. The motive for the murder of the Hall County victim was to silence him so he would not be able to testify against the appellant regarding the first murder. The arson of the trailer, the murder in Habersham County, the murder in Hall County and the arson of the car in Hall County were all part of a continuous transaction and all were mutually dependent crimes. Collins v. State, 239 Ga. 45 (235 SE2d 523) (1977); Stewart v. State, 239 Ga. 588 (238 SE2d 540) (1977). Had the appellant plead not guilty and elected to go to trial on guilt-innocence, the evidence complained of would have been admissible to show scheme, motive, or intent. McClesky v. State, 245 Ga. 108 (SE2d) (1980). It, therefore, follows that such evidence was certainly admissible during the pre-sentence trial in which additional evidence, not admissible

during the guilt-innocence phase, is allowed. Code Ann. § 27-2503. See, Spivey v. State, 241 Ga. 477 (246 SE2d 288) (1978). Furthermore, such evidence is not inadmissible on the ground that it places the defendant's character in evidence. During the pre-sentence hearing, the State, subject to notice limitations, is allowed to place the defendant's character in issue through his prior record or other criminal acts. Code Ann.§§ 27-2503; 27-2534.1. A defendant in a capital case stands before the trial court or jury in a pre-sentence trial a convicted felon with no presumption of innocence. All aspects of his crime or crimes, his character and his attitude are admissible, subject to the applicable rules of evidence regarding reliability, to guide the fact finder in determining appropriate sentence. See, Lockett v. Ohio, ____ U. S. _____ (98 S. C. 2954) (1978); Collier v. State, supra.

Appellant asserts that the trial court's finding that the offense of murder occurred while the offender was engaged in another capital felony: to-wit, the murder of the Habersham County victim, cannot stand because at his subsequent trial for that offense in Habersham County, the appellant was acquitted.

Appellant's subsequent acquittal is not part of the record in this case. Nevertheless, assuming such an acquittal, we find no error. Necessarily, two different triers of fact were involved. Different triers of facts may reach different results. See, Chaffin v. Stynchcombe, 412 U. S. 17 (1973). Under our statute, the fact finder in a pre-sentence trial must determine whether beyond a reasonable doubt any of the statutory aggravating circumstances exist under the evidence presented. Code Ann. §§ 27-2503; 2525, 2534.1. A review of the evidence presented to the trial judge in this case overwhelmingly supports a finding by a rational trier of fact that the appellant was engaged in the commission of another murder when he killed the Hall County victim. Jackson v. Virginia, ____ U. S. _____ (99 S. Ct. 2781) (1979).

In the instant case, the murders were committed in separate counties which of necessity required that one murder be tried before the other.[1/] The subsequent acquittal simply has no bearing on the issue of whether the trier of fact is presented with sufficient evidence to find beyond a reasonable doubt the existence of an aggravating circumstance.

1/ What evidence may have been presented in the second murder trial regarding the first homicide is not before the court, but we can unhesitatingly say that the evidence of the first homicide presented in the instant case was entirely sufficient to prove it.

3. The trial court also found an additional aggravating circumstance in that the murder of the victim in this case was outrageously and wantonly vile, horrible and inhuman in that it involved depravity of mind on the part of the defendant. The appellant argues that such a finding under Code Ann. § 27-2534.1 (b)(7) is incomplete in that the statute requires a finding of either torture or aggravated battery in addition to a finding of depravity of mind. Code Ann. § 27-2534.1(b)(7) provides as follows: "The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." The statute is worded in the disjunctive, not the conjunctive. It is not required that a trier of fact find the existence of each disjunctive phrase of the statute, only that at least one phrase of the first clause of the statute exists due to the existence of at least one phrase of the second clause of the statute. Furthermore, this court has upheld an identical finding of this statutory aggravating circumstance in Corn v. State, 240 Ga. 130 (240 SE2d 694) (1977).

The evidence supports a finding of this aggravating circumstance by a rational trier of fact beyond a reasonable doubt, Jackson v. Virginia, supra.

The evidence shows that the appellant killed his accomplice in an arson case who also happened to be a witness to a murder to prevent any chance the victim would testify against him. It was cold blooded, performed in a methodical, execution-type manner, and the body was burned to destroy any evidence against the appellant. The appellant laughed during the murder of his victim, cursed him and later told others he did not lose any sleep over the killing. He described how people "squealed" when he shot them. Such evidence shows a vile, inhuman murder due to a complete and absolute disregard for human life which is shocking to the conscience of civilized man. It cannot be argued that such actions on the part of the appellant do not evidence a complete depravity of mind. Appellant's third enumeration of error is, therefore, without merit.

4. In his fourth and eighth enumerations of error, the appellant argues that the court erred in admitting evidence of the subsequent escape from jail and his conversations with other inmates. The appellant contends the evidence is inadmissible because it places his character in evidence. As noted above, the instant case was a pre-sentence trial. The appellant admitted

his guilt in open court and waived any right to trial on guilt or innocence. The purpose of a pre-sentence trial is to introduce different evidence from that at trial to determine guilt or innocence. On the issue of guilt or innocence, the only relevant evidence is that which pertains to the offense with which the defendant is charged. In a pre-sentence trial the trier of fact must make a determination as to the sentence to be imposed, taking into consideration all aspects of the crime, the past criminal record or lack thereof, and the defendant's general moral character. Johnson v. State, 126 Ga. App. 757 (191 SE2d 614) (1972); Code Ann. §§ 27-2503, 2528, 2534.1. Any lawful evidence which tends to show the motive of the defendant, his lack of remorse, his general moral character, and his predisposition to commit other crimes is admissible in aggravation, subject to the notice provisions of the statute. Each case is necessarily different; however, such evidence, by way of illustration, may consist as it did here of the defendant's attitude concerning his crime and the victim, the trier of fact's personal observation of the defendant, his conduct after incarceration and evidence of subsequent crimes. See, Ingram v. State, 134 Ga. App. 935

(216 SE2d 608) (1975). In a capital felony pre-sentence trial, the State is not limited to the introduction of evidence to support the particular statutory aggravating circumstances it is relying upon. Upon review of the record, we conclude that the evidence was relevant to sentence and admissible. The evidence being admissible, the trial court did not abuse its discretion in failing to allow the withdrawal of the appellant's guilty plea on the ground that sentence was based upon erroneously admitted evidence.

5. In his fifth enumeration of error, appellant asserts error in the introduction of photographs of the bodies of his victims over objection. This enumeration is clearly without merit, especially in view of the fact that such evidence was presented to the trial judge sitting without a jury. Tucker v. State, 245 Ga. 68 (___ SE2d ___) (1979); Stevens v. State, 242 Ga. 34 (247 SE2d 838) (1978); White v. State, 242 Ga. 21 (247 SE2d 759) (1978); McCorquodale v. State, supra. See Ingram v. State, supra.

6. Appellant contends in his sixth enumeration of error that the trial judge did not consider the appellant's intoxication as a mitigating factor in imposing sentence. While it is undisputed

that the appellant was drinking intoxicating beverages on the day in question, there was no evidence presented which in any manner showed that the appellant was so intoxicated as to not be able to form the requisite criminal intent nor understand the nature of his actions. Tucker v. State, 244 Ga. 721 (261 SE2d 635) (1979). Plaintiff argues that the trial judge did not include intoxication to the extent of impairment of intent and ability to comprehend the criminality of his actions as a mitigating circumstance on the judge's report. However, this does not indicate that the judge failed to consider it as a possible mitigating circumstance.

The appellant relies on an isolated portion of the judge's sentence to show that the trial court failed to take into consideration any mitigating circumstances and sentenced solely on the basis that statutory aggravating circumstances were found, thereby requiring the imposition of a death penalty. Fleming v. State, 240 Ga. 142 (240 SE2d 37) (1972). However, a review of the record in this case shows that the judge considered all the circumstances both in mitigation and aggravation in arriving at his sentence. In fact, the trial judge recited that he considered all the evidence, both in aggravation and mitigation in his finding of

aggravating circumstances as required by Code Ann. § 27-2525. Spivey v. State, supra.

7. The appellant upon call of the case tendered a guilty plea. The trial court exhaustively examined the appellant to determine if the plea was voluntarily and intelligently given. The court thereafter informed the appellant and his counsel that the court was not conscientiously opposed to capital punishment and would impose such a sentence if the facts warranted it. The court then required the appellant to confer with his counsel and recessed for that purpose. Thereafter, the appellant again insisted on a guilty plea. A pre-sentence trial was held pursuant to Code Ann. §§ 27-2528, 27-2503 and 27-2534.1. The State introduced proof not only of the aggravating circumstances but of the crime itself. After the trial court made its findings of fact and orally announced sentence the appellant moved to withdraw his plea. Withdrawal came prior to the clerk receiving the sentence and spreading it upon the record. Appellant enumerates as error the trial judge's refusal to hold an evidentiary hearing to correct the record. However, the appellant's attorney was allowed to perfect the record, and the record adequately reflects the

attempt to withdraw the plea prior to the clerk's receiving it. Neither the trial judge nor the State contest appellant's assertion that the withdrawal came prior to the clerk's receiving the sentence. Appellant's ninth enumeration of error is without merit. See, Patterson v. State, 233 Ga. 724 (213 SE2d 612)(1975); Code Ann. § 6-805(f).

8. Appellant asserts error on the trial court's refusal to allow withdrawal of his guilty plea. The appellant contends that at any time prior to the sentence being received by the clerk and entered upon the docket, a defendant, as a matter of right, may withdraw his plea of guilty. Appellant cites as authority Code Ann. § 27-1404 and cases decided thereunder. Code Ann. § 27-1404 provides in relevant part as follows:

> "...If he shall plead 'guilty,' such plea shall be immediately recorded on the minutes of the court by the clerk, together with the arraignment; and the court shall pronounce upon such prisoner the judgment of the law, in the same manner as if he had been convicted of the offense by the verdict of a jury; but, at any time before judgment is pronounced, the prisoner may withdraw the plea of 'guilty,' and plead 'not guilty,' and such former plea shall not be given in evidence against him on his trial."2/

2/ The statute first appeared at page 834 in Cobb's Digest of the Laws of the State of Georgia published in 1851. Under the common law, a prisoner had no absolute right to withdraw his plea either before or after sentence. Therefore, the statute is in derogation of the common law. Woodward v. State, 13 Ga. App. 130 (78 SE 1009) (1913), dissent of Pottle, J.

The question thus presented is whether or to what extent Code Ann. § 27-1404 applies to Ga. Laws 1973, p. 159 et. seq. which provided for comprehensive new procedures in capital felony cases.

This is a question of first impression as guilty pleas are rare when the State has not waived the death penalty.[3/] From 1956 until the present death penalty statute, if a defendant plead guilty and such a plea was accepted, the maximum penalty that could be imposed was life imprisonment. Ga. Laws 1956, p. 737 (Former Code Ann. § 27-2528). However, under the new Act, there is no such limitation and the trial judge, provided he finds the existence of a statutory aggravating circumstance, may impose a death penalty. Ga. Laws 1973, pp. 159, 171 (Code Ann. § 27-2528).

The present death penalty statute, Ga. Laws 1973, p. 159 et. seq. created a comprehensive new procedure for the trial and imposition of the death penalty in capital felony cases. The statute requires a finding by the trier of fact of at least one specific statutory aggravating circumstance before a death sentence is authorized. The State must prove the existence of such an aggravating circumstance beyond a reasonable doubt.

3/ There are only two cases involving a plea which resulted in a sentence of death under the present statute; Hooks v. State, 233 Ga. 149 (210 SE2d 688) (1977) and Mitchell v. State, 234 Ga. 160 (214 SE2d 900) (1975). These cases do not address the question.

The trial of a capital felony is, therefore, in two parts: one to determine guilt or innocence and the other to determine sentence. In both phases, the State carries the burden of proof. In a non-capital felony, the judge conducts a pre-sentence hearing to determine sentence and the State may tender evidence of aggravation if it so chooses, but no factual finding is required to authorize imposition of any sentence within the statutory limits. Code Ann. § 27-2503.

Against this background we must construe the two statutes in question, keeping in mind the legislative intent, the old law, the evil and the remedy. Code Ann. § 102-102.

The purpose of the withdrawal provision of Code Ann. § 27-1404 is to provide a necessary part of the plea bargaining procedure, Smith v. State, 231 Ga. 23 (200 SE2d 119) (1973). Its provisions have been held to apply to nolo contendre pleas, Wright v. State, 75 Ga. App. 764 (44 SE2d 569) (1947), but not to pleas which result in first offender treatment, Heath v. State, 148 Ga. App. 559 (252 SE2d 4) (1978), because to do so would frustrate the purpose of the First Offender Act.

Where a plea of guilty is entered in a capital felony case and the State seeks the death penalty under Code Ann. § 27-2534.1,

plea bargaining is not involved nor could it ever be involved. Therefore, Code Ann. § 27-1404 would have no purpose under such a circumstance. Furthermore, to apply Code Ann. § 27-1404 to such a situation would frustrate the purpose of Ga. Laws 1973, pp. 159, 171, in that the plea could be withdrawn as a matter of right after the defendant learns a death sentence has been announced. Therefore, under this construction a death sentence could never be imposed upon a guilty plea if the defendant wished to avoid it.

Where a plea of guilty is filed in a non-capital felony, the judgment does not rest upon the results of a trial, but upon the plea, which is nothing more than a confession in judicio. Code Ann. § 27-1404 provides that the court, "...shall pronounce... the judgment, in the same manner as if he had been convicted of the offense by the verdict of a jury." However, in capital cases, the judgment does not rest upon the plea but rather upon the plea and the proof of an aggravating circumstance except in rare cases of treason or aircraft hijacking.[4/] Code Ann. § 27-2534.1(a). Capital cases, therefore, require further proceedings in all but two instances, a procedure not envisioned by Code Ann. § 27-1404. The decision of the trial court after a sentencing trial is

4/ The reports contain no such cases under the new statute, in which a death penalty was given.

tantamount to a jury verdict. For this reason and the others enumerated herein, this court concludes that the provisions of Code Ann. § 27-1404 relating to withdrawal of guilty pleas as a matter of right do not apply to guilty pleas tendered in capital cases other than treason or aircraft hijacking in which the State seeks the death penalty.[5/] We hold that a guilty plea, voluntarily and knowingly entered in a capital felony case other than treason or aircraft hijacking wherein the State seeks the death penalty under Ga. Laws 1973, p. 159 et. seq. may not be withdrawn as a matter of right.

9. In his last enumeration of error the appellant contends that the trial court erred in denying appellant's motion for new trial on general grounds and on the grounds previously considered. This enumeration has no merit. Upon review of the transcript and record we find that the verdict is factually substantiated and that the evidence supports such a verdict by a rational trier of fact beyond a reasonable doubt. Jackson v. Virginia, supra.

10. As mandated by the statute, Ga. Laws 1973, pp. 159, 165 (Code Ann. § 27-2537) we have reviewed the transcript and record

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5/ Nothing herein should be construed as approval by this court of the Court of Appeals' interpretation of Code Ann. § 27-1404 as permitting withdrawal of a guilty plea after sentence is orally pronounced.

in this case as we have in all prior cases under this statute. We find that the sentence of death was not imposed under the influence of passion, prejudice or any other arbitrary factor.

In reviewing the death penalty in this case, we have considered the cases appealed to this court since January 1, 1970, in which a death or life sentence was imposed. We find the similar cases listed in the appendix support affirmance of the death penalty.

Appellant's sentence of death is not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Judgment affirmed. All the Justices concur, except Hill, J., concurs specially.

APPENDIX

1. Henderson v. State, 227 Ga. 68 (179 SE2d 76) (1971
2. Kramer v. State, 230 Ga. 855 (199 SE2d 805) (1973)
3. Floyd v. State, 233 Ga. 280 (210 SE2d 810) (1974)
4. Mitchell v. State, 234 Ga. 160 (214 SE2d 900) (1975)
5. Moore v. State, 240 Ga. 807 (243 SE2d 1) (1978)
6. Westbrook v. State, 242 Ga. 151 (249 SE2d 524) (1978)
7. Burger v. State, 242 Ga. 28 (247 SE2d 834) (1978), aff'd on resentencing _____ Ga. _____ #35709, decided 3/14/80
8. Ruffin v. State, 243 Ga. 95 (252 SE2d 172) (1979)
9. Tucker v. State, 244 Ga. 721 (261 SE2d 635) (1979)
10. Gates v. State, 244 Ga. 587 (261 SE2d 349) (1979)
11. Dampier v. State, _____Ga. _____ #35378, decided 2/20/80

HILL, Justice, concurring.

I concur in the judgment affirming the death penalty on the basis of the aggravating circumstance discussed in division 3 of the opinion, but not on the basis of the aggravating circumstance described in division 2, to wit: the Habersham murder of which the defendant was later acquitted.

Please substitute page 15. Non-material change.
Citation added to footnote #3.

The question thus presented is whether or to what extent Code Ann. § 27-1404 applies to Ga. Laws 1973, p. 159 et. seq. which provided for comprehensive new procedures in capital felony cases.

This is a question of first impression as guilty pleas are rare when the State has not waived the death penalty.[3/] From 1956 until the present death penalty statute, if a defendant plead guilty and such a plea was accepted, the maximum penalty that could be imposed was life imprisonment. Ga. Laws 1956, p. 737 (Former Code Ann. § 27-2528). However, under the new Act, there is no such limitation and the trial judge, provided he finds the existence of a statutory aggravating circumstance, may impose a death penalty. Ga. Laws 1973, pp. 159, 171 (Code Ann. § 27-2528).

The present death penalty statute, Ga. Laws 1973, p. 159 et. seq. created a comprehensive new procedure for the trial and imposition of the death penalty in capital felony cases. The statute requires a finding by the trier of fact of at least one specific statutory aggravating circumstance before a death sentence is authorized. The State must prove the existence of such an aggravating circumstance beyond a reasonable doubt.

3/ There are only three cases involving a plea which resulted in a sentence of death under the present statute; Hooks v. State, 233 Ga. 149 (210 SE2d 688) (1977); Moore v. State, 233 Ga. 861 (213 SE2d 829) (1975) and Mitchell v. State, 234 Ga. 160 (214 SE2d 900) (1975). These cases do not address the question.

In the Supreme Court of Georgia

JUN 24 1980

35701. FAIR v. STATE

ADDENDUM

(a) Subsequent to our decision in this case, but prior to transmittal of the remittitur to the trial court, the Supreme Court of the United States has decided Godfrey v. Georgia, 48 LW 4541 (May 19, 1980). In that the appellant's sentence of death rests partially[1/] upon Ga. Code § 27-2534.1(b)(7), his sentence must be reviewed in light of Godfrey.

Code Ann. § 27-2534.1(b)(7) provides in pertinent part: "The offense of murder. . . was outrageously vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." In Godfrey, the court found that § (b) (7) was unconstitutionally applied in that case. We find material differences between Godfrey and the case under review, which distinguish this murder from the murder in Godfrey and from other "ordinary" murders for which the death penalty is not appropriate.

1/The judge found the existence of two statutory aggravating circumstances, Code Ann. §§ 27-2534.1(b)(2) and 27-2534.1(b)(7). In Godfrey, the court was concerned with a sentence of death resting exclusively on § 27-2534.1(b)(7). Godfrey v. Georgia, 48 LW 4541, n.15. The other statutory aggravating circumstances are more "specific and measurable." Godfrey v. Georgia, 48 LW 4541, 4542, n.2. Therefore, under our decisions, the death penalty, infra, may be upheld upon § 27-2534.1(b)(2). Gates v. State, 244 Ga. 587 (261 SE2d 349) (1979); Burger v. State, 245 Ga. 458 (SE2d) (1980).

In our opinion in this case, we held that the trial court's finding beyond a reasonable doubt that the murder was outrageously and wantonly vile, horrible and inhuman in that it involved depravity of mind on the part of the defendant, was supported by the evidence. That evidence showed that appellant had had no quarrel with his victim. Rather the victim was killed simply because he had witnessed appellant's previous murder and appellant was afraid he would testify against him. While pretending they were still friends, appellant lured the victim into a vulnerable position and then shot him in the head. Aside from laughing during the killing itself, appellant showed no remorse thereafter but instead bragged about the killing and said he would kill the other witnesses when he got out of jail. Appellant's accomplice cut the victim's throat and appellant then burned the body. A defendant who mutilates or seriously disfigures a victim's body after death (cf. Code Ann. § 26-1305), may be found to have a depraved mind and such acts would be sufficient to show depravity of mind of the defendant within the meaning of the statute. (See Hance v. State, Case No. 36012, Decided June 24, 1980, after the main opinion in this case.) Appellant's actions in this case take this murder out of the category of "ordinary murders."

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 79-6884

KEITH FAIR,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

SUPPLEMENTAL BRIEF IN SUPORT OF WRIT OF CERTIORARI

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TO THE SUPREME COURT OF GEORGIA

SUPPLEMENTAL BRIEF IN SUPPORT OF WRIT OF CERTIORARI

Petitioner respectfully submits this supplemental brief seeking a writ of certiorari to review the judgment of the Supreme Court of Georgia affirming his conviction and sentence to death. Since the filing of the original Petition in this Court the opinion below has been reported as Fair v. State, 245 Ga. 868, SE 2d (1980).

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I. PETITIONERS CONSTITUTIONAL ISSUES ARE PROPERLY BEFORE THIS COURT.

Respondent has conveniently avoided the crux of Petitioner's argument in cleverly attempting to argue that the issues now before this Court have not been raised properly below.

However, the violation of Petitioner's constitutional rights was a direct result of the Georgia Supreme Court opinion itself.

It is well settled law that state courts may not juggle their laws in an unpredictable and inconsistent fashion to the prejudice of federal constitutional rights. See, e.g., Staub v. Baxley, 355 U.S. 313, 320 (1958); N.A.A.C.P. ex rel. Patterson v. Alabama, 357 U.S. 449,454-458 (1958); N.A.A.C.P. v. Alabama, ex rel. Flowers, 377 U.S. 288, 293-301 (1964); Wright v. Georgia, 373 U.S. 284, 289-291 (1963)

In Paul v. Davis, 424 U.S. 693 (1976) this Court said:

> "It is apparent from our decisions that there exists a variety of interests which are difficult of definition but are nevertheless comprehended within the meaning of either 'liberty' or 'property' as meant by the Due Process Clause. These interests attain constitutional status by virtue of the fact that they have been initially recognized and protected by state law, and we have repeatedly ruled that the procedural guarantees of the Fourteenth Amendment apply whenever the state seeks to remove or significantly alter that protected status...In each of these cases, as a result of the state action complained of, a right or status previously recognized by state law was distinctly altered or extinguished. It was this alteration, officially removing the interest from the recognition and protection previously afforded by the state, which we found sufficient to invoke the procedural guarantees contained in the Due Process Clause of the Fourteenth Amendment."

It is clear that in the instant case, what Petitioner complains of is the unforseeable judicial curtailment of his statutory rights by the Georgia Supreme Court in its affirmance of Petitioner's conviction and sentence to death.[1]

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[1] It must be noted that Petitioner clearly raised these issues in his Motion for Rehearing before the Georgia Supreme Court. (R-) (record unavailable)

Respondent recognizes that this is a case of first impressions for the Georgia Supreme Court. Brief of Respondent, pp. 14,16. Respondent also recognizes this Courts rulings in Bouie v. Columbia, 378 U.S. 347 (1964) and Bunkerhoff Farris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930). Clearly, under those cases, where the construction of a state statue by the highest court of that state violates a constitutional mandate; and, as here, results in a sentence of death, it cannot be seriously argued that this Court cannot review such a procedure.[2]

Time after time, since early in the nineteenth century, the Georgia Court of Appeals has tenaciously guarded the criminal defendants right to withdraw his guilty plea. See, Ware v. State, 128 Ga. App. 407. In Ware, the trial court scrupulously examined the defendant; advised her of all her rights accruing under the federal and state constitutions; indicated that the sentence might be the maximum allowable under law; and determined the voluntariness of her plea. The court reversed the conviction citing as error the trial courts failure in not permitting the defendant to withdraw her plea of guilty. In so ruling, the court stated:

> "Even though there is currently a hue and cry against courts enforcing our time honored individual rights earned through the blood of American patriots, we cannot and we shall not yield to such clamor. The courts must remain the bastion protecting the individual and his rights."
>
> 128 Ga. App. at 412

Further, contrary to the assertion of both the Respondent (Brief, p.13) and the Georgia Supreme Court (Slip. Opinion, P.16), the purpose of this statute (27-1404) is not to facilitate plea bargaining; but, as has been recognized throughout the history of the statute, its purpose is to "guarantee to all persons charged with crime a trial by a jury". Woodward v. State, 13 Ga. App. 130,131. Thus, the opinion below has both eliminated the Defendants

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[2] It must be noted that the Georgia Supreme Court failed to directly meet the issue of "pronouncement" under Ga. Code Ann. 27-1404, and religated its comments to mere dictum in a footnote. Fair, slip opinion at P. 18, fn. 5.

statutory right, and denied him a trial by jury as guaranteed by the Sixth Amendment.

In sum, clearly the constitutional question arises from the Georgia Supreme Courts opinion itself. Even where state courts have not previously interpreted a state statute (nor passed on its constitutionality), it is the duty of the federal courts to decide the federal question arising therefrom. See, Zwickler v. Koota, 389 U.S. 241. Respondent has failed to recognize that a statute may be both unconstitutional on its face; or, may be unconstitutionally applied under the facts of a particular case. It is the latter which Petitioner asserts in the instant Petition, which may, of course, be reviewed by this Court.

This Court has recognized the qualitative difference between capital cases and criminal cases in general, thus requiring particular scrutiny to assure fairness at all stages of a capital proceeding. It is the nature of the sanction, not the type of proceeding, which controls the application of procedural protections. Thus, in any capital case, the procedures employed must bear a reasonable relation to the quality of the santion to be imposed.

The death penalty is a unique sanction and, as such must be treated as a unique feature of our jurisprudence. Georgia law has created a procedural structure which offers its protection to all criminal defendants. The opinion below seeks to distinguish between a capital defendant and other criminal defendants which does not satisfy the strict equation required by this Court before a state may assert its constitutional right to claim human life. The temporal principles of " due process " sound hollow, even cruel, in the context of the death penalty. Constitutional rights may be recognized and restored to the living, but these rights cannot be restored to the dead. Fair seeks to assert his statutory any constitutional rights, but has been denied by the application of statutory interpretation given by the opinion of the Georgia Supreme Court below.

II. THE GEORGIA SUPREME COURT IMPROPERLY AFFIRMED THE IMPOSITION OF THE DEATH PENALTY UNDER GA. CODE ANN. 27-2534.1(b)(7) AND GODFREY v. GEORGIA 48 U.S.L.W. 4541 (1980).

The review of all death cases mandated by the Georgia death penalty scheme (Ga. Code Ann. 27-2537) and this Courts rulings that this review is a

constitutionally required safeguard "to assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants", Gregg v. Georgia, 428 U.S. 153,204 (1976) (plurality opinion) require that the Georgia Supreme Court meet all constitutional infirmities appearing in the sentencing phase of a death case. As the prevailing opinion in Godfrey v. Georgia, 48 U.S.L.W. 4541 emphasized, the Supreme Court of Georgia has not "applied a constitutional construction of the phrase 'outrageously or wantonly vile, horrible or inhuman'..." 48 U.S.L.W. 4545. Unless such a construction is employed in the sentencing review, such a death sentence cannot stand.

The review conducted by the Georgia Supreme Court has no evidentiary support in the record. A finding without evidentiary support in the record is by definition arbitrary. See, Schware v. Board of Bar Examiners, 353 U.S. 232,239 (1957) and cannot supply any "principled way to distinguish [a]... case, in which the death penality was imposed, from the many cases in which it was not." 48 U.S.L.W. at 4545. Where federal rights are at stake, factual findings upon which their denial turns are subject to plenary and independent federal review on appeal, See, e.g., Edwards v. South Carolina, 372 U.S. 229, 235 (1963); Haynes v. Washington, 373 U.S. 503, 515-516 (1963), and cases cited. Here, the facts cannot fairly be found to fall within a properly limited construction of (b)(7) and the death sentence imposed therein is therefore arbitrary and capricous.

Further, the addendum to Petitioner's opinion fails to satisfy Godfrey in that:

(a) The fact that one or more aggravating circumstances other than the one defined by (b)(7) was found does not immunize a death sentence from invalidation under Godfrey. If a (b)(7) finding was among those found by the trial court, the ensuing death sentence must be set aside, however many other aggravating circumstances were also found.

Pursuant to the Georgia statutory procedure, a sentencing jury (or judge) makes its life-or-death decision after a deliberative process in which "attention is directed to the specific circumstances of the crime [and]...the characteristics of the person who committed the crime". Gregg, supra, 428 U.S. at 197. The function of the statutory definitions of aggravating circumstances is to direct the sentencer's attention to the relevant factors. Id. at 197-198, 206-207. In the case of judge sentencing, the trial

judge must consider all of those factors which are warranted by the evidence. A life sentence may be recommended even if two or three or four or five aggravating circumstances are found. One or more aggravating circumstances findings is enough to permit a death sentence; but no particular number ever requires a death sentence. Under this scheme, each and every aggravating circumstance which the judge finds may therefore tip the delicate balance; and, if a death sentence is returned, the part played in it by any single aggravating circumstance which the jury found "can only be the subject of sheer speculation." 48 U.S.L.W. at 4544. Thus, if a (b)(7) finding was impermissibly permitted it may or may not have spelled the difference between life and death. No one knows, or can know, that it did not. This invokes the ordinary rule that any ambiguity as to whether a judgment rests upon a constitutionally unsound footing requires its reversal. See, e.g., Shuttlesworth v. Birmingham, 382 U.S. 87, 91-92 (1965); and cf. Chapman v. California, 386 U.S. 18, 23-24 (1967). Therefore, if a criminal case is submitted to a judge under instructions which permit him to convict upon alternate legal theories one of which is constitutionally acceptable and another of which is constitutionally unacceptable its general verdict of conviction cannot stand. E.g., Stromberg v. California, 283 U.S. 359, 367-368 (1931); Bachellar v. Maryland, 397 U.S. 564, 570-571 (1970). This rule is the same where the trier of fact is a judge rather than a jury . E.g., Thomas v. Collins, 323 U.S. 516, 528-529 (1945); Street v. New York , 394 U.S. 576, 585-588 (1969)

That these fundamently principles apply with no less force at the penalty stage of a death case cannot be argued; indeed they apply with added force. E.g., Presnell v. Georgia, 439 U.S. 14, 16 (1978); Woodson v. North Carolina, 428 U.S. 280, 305 (1976). Woodson, supra, makes it intolerable that a death sentence should be carried out where there is any ambiguity in the record as to whether constitutional requirements for capital sentencing have been observed. See also, Witherspoon v. Illinois, 391 U.S. 510, 522 n. 21 (1968); Andres v. United States, 333 U.S. 740, 752 (1948).

(b) The addendum fails to support the necessary elements of the Georgia Supreme Court's tests in Harris v. State, 237 Ga. 718, 230 SE 2d 1 (1976) and Blake v. State, 239 Ga. 292, 236 SE 2d 637 (1977) as construed by

Godfrey, supra. Specifically, that "depravity of mind" comprehends only the kind of mental state that led the murderer to torture or to commit an aggravated battery before killing the victim; and that the word "torture" must be construed in pari materia with "aggravated battery" so as to require evidence of serious physical abuse of the victim before death. No facts authorizing such a reading are present in the record, nor in the addendum of the Georgia Supreme Court opinion.

(c) The Courts reliance on Hance v. State, 245 Ga. 856, 862 in the addendum is also inapposite. The court there stated in pertinent part:

> "A defendant who mutilates or seriously disfigures the victim's body after death (cf. Code 26-1305,supra)...may be found to have a depraved mind..."

It will be noted from the opinion that no authority is cited for this proposition. Evidently it materialized in an effort to somehow substain death sentences in this State. Further, it is clear from the addendum and record that Petitioner's accomplice cut the victim's throat after death. Addendum, p. 2. Nor does Hance, supra, mention or in any way overrule Harris, supra, or Blake, supra, nor does it meet the Godfrey analysis relative thereto. Apparently, the Georgia Supreme Court has found a new "catch-all" to uphold death sentences.

(d) Petitioners inability to contest - in any fashion - by brief or argument, the addendum is in itself a denial of due process of law as guaranteed by the Fifth and Fourteenth Amendments.

III. THE COURTS RELIANCE UPON STANDEFER v. UNITED STATES, ___U.S. ___, 100 S.CT. 1999 (1980) IS INAPPOSITE.

The Georgia Supreme Court and Respondent both rely upon Standefer, supra, in urging affirmance of Petitioner's death sentence based upon Ga. Code Ann. 27-2534.1(b)(2). However, in Standefer, supra, the question before this Court was whether a defendant accused of aiding and abetting in the commission of a crime may be convicted after a named principal has been acquited of that offense. Standefer, 100 S. Ct. at 2001.

It is clear from the outset that Standefer, supra, involved trials of two different individuals for different crimes. In the case at bar, of course, we have a single defendant charged with capital murder in two counties.

If indeed "different juries may reach different results" then the doctrine of double jeopardy and its counterpart of collateral estoppel have no place in our system of justice. Does this mean a criminal defendant may be tried, acquitted, a new jury impaneled, and a conviction sustained? Obviously not. It is apparent that the State seeks to substitute its opinion of the adequacy of punishment for that of the jury which actually tried the case and resolved all the factual issues therein.

CONCLUSION

In light of the unique issues presented by this Petition; the significance of the decision below for future death cases both in Georgia and nationally, it is respectfully submitted that a Writ of Certiorari should issue to review the judgment and opinion of the Supreme Court of Georgia.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, BRUCE S. HARVEY, do hereby certify that I have furnished a copy of the within and foregoing Supplemental Brief in Support of Writ of Certiorari to the Supreme Court of Georgia, by mail, to:

Honorable Jeff C. Wayne
District Attorney for the
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and

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in an envelope with sufficient postage thereon to carry same to its destination.

This 1st day of October, 1980.

Bruce S. Harvey
COUNSEL FOR PETITIONER

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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-6884

KEITH FAIR,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

APPENDICIES FOR BRIEF IN OPPOSITION

Please serve:

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APPENDIX A - APPELLANT'S BRIEF

TO THE SUPREME COURT OF GEORGIA

IN THE SUPREME COURT OF GEORGIA

CASE NUMBER 35701

KEITH FAIR,

APPELLANT

Vs.

THE STATE,

APPELLEE

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PART I

STATEMENT OF THE CASE

On or about May 8, 1979, Appellant and Becky Nations were riding around drinking and stopped at Dexter Thomas's house (T-407). Appellant had been drinking quite a bit and, in fact, had consumed over a quart of Canadian Mist liquor (T-407).

At this point, because Appellant's counsel objected to all testimony and evidence with respect to any incidence involving the Appellant in Habersham County, and particularly because Appellant has since been acquitted of any offense in Habersham County (see Exhibit "B"), the Statement of the Case will limit itself to a discussion of what occurred in Hall County.

Later in the evening on May 8, 1979 Appellant, Becky Nations, Jackie Morris (victim), Dexter Thomas, and Sherill Land met at a Huddle House in Gainesville, Georgia (T-408, 409). Appellant left the Huddle House and went to Bradley Highfield's house to borrow Highfield's car because Appellant's car was not operating properly (T-409, 410). Appellant continued to drink throughout the entire evening (T-413).

By this time, Morris, Thomas and Land had already left the Huddle House so Appellant, Nations and Highfield started towards Cornelia whereupon they re-established contact with Morris, Thomas and Land (T-411).

Appellant and the entire group then went to B-Minor Road to

Morris' car (T-412). During the discussions with respect to the burning of Morris' car, Appellant and Morris began arguing "real heavy" and Appellant shot Morris (T-414). Thomas and Appellant then placed the body of Morris in Morris' car (T-416). Thomas then set fire to Morris' car and Appellant and Highfield then carried Thomas, Land and Nations home (T-417). On the way home, Thomas remarked how Morris had the toughest skin that he had ever seen (T-418). All persons in the car at that time were of the opinion that nothing should be said about what had occurred on B-Minor Road (T-418).

During Appellant's incarceration, prior to trial, others in the jail with him had opportunities to read some of the witnesses' statements and the like which Appellant had in his possession (T-423).

In mitigation, Appellant had several witnesses testify as to Appellant's character (T-443, 455).

After pretrial motions and other matters were concluded by the trial court, Appellant announced that he wanted to plead guilty to the murder of Jackie Morris (T-3-21). The trial judge accepted the plea and conducted without a jury a full scale trial on the issue of mitigation or aggravation to determine whether life imprisonment or the death penalty would be imposed as punishment.

After the trial and deliberation, the trial judge orally announced that the death penalty would be imposed and Appellant immediately withdrew his plea of guilty orally and by written

withdrawal (T-484, 487). The trial court refused Appellant's timely withdrawal and refused Appellant's request for an evidentiary hearing (T-491, R-9-22). Subsequent motions were filed and denied by the trial court and the instant appeal, being automatic, was taken.

IN THE SUPREME COURT OF GEORGIA

CASE NUMBER 35701

KEITH FAIR,

APPELLANT

Vs.

THE STATE,

APPELLEE

PART II

APPELLANT'S
ENUMERATIONS OF ERROR

1.

The lower court erred in denying Appellant's motion to strike as unconstitutional the Georgia statute providing for the imposition of the death penalty (R-92, R-139, 140).

2.

The lower court erred in allowing prejudicial testimony and evidence relating to a separate charge of murder in Habersham County in the trial of this case and in relying on this evidence as a statutory aggravating circumstance warranting the

imposition of the death penalty sentence before the guilt or innocence of the Appellant was determined by the proper forum in Habersham County. (See Exhibit "A" for digest of objections and rulings).

3.

The lower court erred in denying Appellant's motion for directed verdict of life sentence (T-376, 455) or motion for judgment notwithstanding the verdict for life sentence (R-139).

4.

The lower court erred in allowing evidence over objection of Appellant as to escape (T-325, 326, 328, 356, 34, 37) and prejudicial unrelated and remote occurrences and events (T-325, 326, 328, 356, 34, 37, 327, 328, 361-363).

5.

The lower court erred in allowing photographs of Hoyt Turner and Jackie Morris in evidence over objection of Appellant (T-29, 33, 47, 51, 57, 60, 61, 62, 63, 64, 74, 75, 76, 78, 108, 129).

6.

The lower court erred in imposing the death penalty without consideration of the Appellant's intoxication at the time of commission of the crime as a mitigating factor and without considering the rule of law in Thomas v. State, 240 Ga. 403.

7.

The trial court erred in refusing to allow the Appellant to withdraw his guilty plea as a matter of right prior to pronouncement of sentence. (T-484, 487).

8.

The trial court abused its discretion by denying Appellant's motion to withdraw his plea of guilty after pronouncement of sentence. (R.9-22).

9.

The trial court erred in denying Appellant's oral and written motions for an evidentiary hearing with respect to what transpired at Appellant's sentencing hearing (R.9-22).

10.

The trial court erred in denying Appellant's motion for new trial (R-139, 149).

PART III

ARGUMENT AND CITATION OF AUTHORITIES

1.

By enumeration of error numbered 1, defendant assigns as error the court's denial of defendant's motion (R-92) to strike as unconstitutional the Georgia statute providing for the imposition of the death penalty (R-92,139,140).

This statute should be quashed and held unconstitutional in that it is applied in a way that violates the constitutional prohibition against the use of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States and the rule of law espoused and mandated in Furman v. Georgia 408 U.S. 238 (1972).

Georgia Laws 1973, pp. 159, 163 (Ga. Code §27-2534.1) is discretionary and is applied discriminatorily against certain classes of defendants in violation of the Due Porcess and Equal Protection Clauses of Art. I., Sec. I, Pars. II and III of the Georgia Constitution (Ga. Code §2-102) and of the Fourteenth Amendment to the United States Constitution.

The categories of aggravating circumstances in Georgia Laws 1973, pp. 159, 163 (Ga. Code §27-2534.1) are applied in an unreasonable and arbitrary manner in violation of the Equal Protection Clause of Art. I, Sec. I, Par. II of the Georgia Constitution (Ga. Code §2-102) and of the Fourteenth Amendment

to the United States Constitution.

Georgia Laws 1974, pp. 352, 353 (Ga. Code §27-2302) allows the jury subjective discretion in applying the death penalty in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

Georgia Laws 1973, pp. 159, 165 (Ga. Code §27-2537(f)), provides for the collection of data on sentences imposed in capital felony cases after January 1, 1970, for purposes of reviewing death sentences as excessive, disproportionate or arbitrary. The statutory check against the arbitrary and discriminatory application of the death penalty is not being complied with, thereby depriving defendants sentenced to death of an effective or adequate review of their sentence in violation of due process of law.

Georgia Laws 1973, pp. 159, 163 (Ga. Code §27-2534.1), is applied arbitrarily and discriminatorily against certain classes of defendants in violation of the Due Process and Equal Protection Clauses of Art. I, Sec. I, Pars. II and III of the Georgia Constitution (Ga. Code §§2-102, 2-103) and the Fourteenth Amendment to the United States Constitution, in that the Georgia Supreme Court compares death cases only with those cases in which a death sentence has been received and in which it has upheld that death sentence.

Georgia Laws 1973, pp. 159, 163 (Ga. Code §27-2534.1), is applied arbitarily and discriminatorily against certain classes of defendants in violation of the Due Process and Equal

Protection Clauses of Art. I, Sec. I, Pars. II and III of the Georgia Constitution (Ga. Code §§2-102, 2-103), and the Fourteenth Amendment to the United States Constitution, and in violation of the United States Supreme Court's mandate in Gregg v. Georgia, 428 U.S. 153 (1976), in that the Georgia Supreme Court does not submit written findings comparing cases in which it reviews death sentences with similar cases, but merely lists other cases and states that it has made the required comparison. Such a procedure prohibits a defendant from challenging the affirmation of his/her death sentence as arbitrary and discriminatory, because the defendant is given no notice as to which permissible factors the Court has used in such comparison.

2.

By enumeration of error numbered 2, Appellant assigns as error the Court's allowance of evidence and testimony relating to separate charges filed against him in Habersham County, which evidence was relief upon and cited by the Court as an aggravating circumstance supporting the imposition of the death penalty sentence. (See Exhibit "A" for objections and rulings).

Consider, please, these circumstances:

1) The Appellant is charged with the murder of Hoyt Turner in Habersham County alleging that the Appellant shot Turner on May 8, 1979 in Habersham County and disposed of his body in Lake Lanier. Trial is scheduled in November, 1979,

with Bruce Harvey, a Habersham County attorney appointed by the Court to represent him (T-66).

2) The Appellant is charged with the murder of Jackie Morris in Hall County alleging that the Appellant shot Morris on May 9, 1979 in Hall County and disposed of his body by burning it in an automobile. Hall County attorneys are appointed to represent the Appellant for the Hall County charge.

3) The Appellant tenders a plea of guilty in Hall County Superior Court and the punishment issue is tried before the Hall County Superior Court on August 14, 1979 (T-20).

4) Before trial or disposition of the Habersham County indictment, the Hall County court rules admissible voluminous and extended testimony and evidence of the Habersham County charge of murder on the theory of showing motive and identity under New v. State, 67 Ga. App. 442 over repeated objections. (See Exhibit "A").

5) The Appellant testified and admits guilt in the Hall County charge of murder, but under advice from his Habersham County attorney, Bruce Harvey, and Hall County attorneys, invokes his Fifth Amendment privilege against incrimination when questioned concerning the Habersham County charge (T-426, 432, 433, 437, 439, 441, 454).

6) The Court receives this evidence and imposes the death sentence, citing as an aggravating circumstance the Appellant's commission of another capital felony at the time of the Hall County murder, that being the murder of Hoyt Turner

in Habersham County (T-492-494).

7) The Appellant, tried later in Habersham Superior Court for the murder of Hoyt Turner, is acquitted of that offense.

THE HALL COUNTY SUPERIOR COURT ALLOWED EVIDENCE IN THE TRIAL OF THE MURDER OF JACKIE MORRIS WHICH NAMED APPELLANT AS THE MURDERER OF HOYT TURNER IN HABERSHAM COUNTY. WITHOUT CONSIDERATION OF THE RIGHT OF THE APPELLANT TO ANSWER TO THOSE ALLEGATIONS IN HABERSHAM COUNTY WITH HIS HABERSHAM COUNTY COUNSEL, THE HALL COUNTY SUPERIOR COURT SUMMARILY HELD THAT APPELLANT WAS GUILTY OF BOTH MURDERS AND IMPOSED THE DEATH PENALTY ON THE BASIS OF GA. CODE ANN. §27-2534.1(b)(2), WHICH CHARGE THE APPELLANT WAS LATER ACQUITTED!

This disgraceful miscarriage of justice resulted from the dilemma in which the Appellant found himself with indictments returned against him in two different counties with separate legal counsel assigned in each county. Voluminous evidence concerning the separately indicted Habersham County charge was allowed over objection to explain "motive," "identity," "res gestae," and "course of conduct." Appellant's Habersham County attorney, lacking standing in Hall County Superior Court (T-69, 401-404) to object or conduct the trial of the case, directed the Appellant to invoke his Fifth Amendment right against self-incrimination (T-402, 426).

Mistakenly following New v. State, 67 Ga. App. 442, which allowed evidence of similar crimes to show motive and

identity even before conviction, the Court used this kangaroo court finding of guilt in Habersham County as a springboard for the imposition of the death sentence, by treating it as an aggravating circumstance. Although juries in many cases have used evidence of the guilt of one capital felony to provide the aggravation required for the imposition of the death penalty for another capital felony, these charges have all been tried before the same forum (Example: Pryor v. The State, 238 Ga. 698).

Georgia Code Ann. §27-2534.1(b)(1) applies where a prior conviction of a capital felony is cited for aggravating circumstances, which of course implies that the appellate process for the prior conviction would have to be exhausted before it could rise to the level of an aggravating circumstance.

Evidence which in any manner shows or tends to show that the accused has committed another crime wholly independent for which he is on trial, even though it be a crime of the same sort, is irrelevant and inadmissible. Williams v. State, 152 Ga. 521. A somewhat similar situation was presented in Kincaid v. The State, 136 Ga. App. 732, where the State introduced evidence as to "other search warrants in which they (defendants) were involved, but were not convicted." (p. 733). Without any showing that guilt was proven against the defendant because of such previous search warrants and searches, the Court reversed the conviction because it placed the defendant's character into issue and was highly improper. To introduce prejudicial evidence in this case as to then unresolved charges

in Habersham County is similar error, and should be corrected by this Court.

3.

By enumeration of error numbered 3, Appellant assigns as error the Court's refusal to direct a verdict of life sentence because of the failure of the State to prove the existence of aggravating circumstances beyond a reasonable doubt (T-376, 455, R-139).

The State in this case relied on two aggravating circumstances for their demand for the death penalty under Ga. Code Ann. §27-2534.1(b)(1-10):

(1) That the offense of murder of Jackie Morris was committed while the Appellant Keith Fair was engaged in the commission of another capital felony, to-wit: the murder of Hoyt Turner in Habersham County.

(2) That the offense of murder of the victim in this case was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim (R-32).

It is unconceivable that the first aggravating circumstance is present since the Appellant has since been acquitted of the charge of murder of Hoyt Turner in Habersham County (Exhibit "B"), and it was error for the Court to consider evidence as to this charge and summarily imply guilt when the disposition of that charge was settled in a different forum. (See Enumeration of Error No. 2).

As to the second aggravating circumstance, the finding

and order of the lower court on its face (R-98), is insufficient as a matter of law under Ga. Code Ann. §27-2534.1(b)(7) because it found no evidence of torture of the victim. In Harris v. State, 237 Ga. 732, the Court stated:

> "This aggravating circumstance (§27-2534.1(b)(7) involves both the effect on the victim, viz., torture, or an aggravated battery, and the offender, viz., depravity of mind. As to both parties the test is that the acts (the offense) were outrageously or wantonly vile, horrible, or inhuman."

The Court continued by adding at p. 732:

> "Under our duty specified in Code Ann. §27-2537(c)(2) we have no intention of permitting this statutory aggravating circumstance to become a 'catch all' for cases simply because no other statutory aggravating circumstance is raised by the evidence."

An examination of the case cited in Harris v. State, supra, as examples of proper (b)(7) examples illustrate the necessity of evidence as to both aspects of this aggravating circumstances. In every example, the evidence illustrated both depravity of mind on the part of the defendant and either torture or aggravated battery to the victim. House v. State, 232 Ga. 140; McCorquodale v. State, 233 Ga. 369; Banks v. State, 237 Ga. 325.

The lack of torture or aggravated battery is apparent in this case from the testimony of the State's witness, pathologist doctor, Byron Dawson of the State Crime Lab (T-145):

> "Q. Doctor Dawson, I asked you whether or not in your autopsy of Jackie Morris, and in your medical opinion, and from your experience as a pathologist whether or not you found any evidence whatsoever of torture, and I believe that your response was that you did not find any such evidence, is that correct."
>
> A. That's correct, again with the qualification that were there or had there been injuries which were destroyed by the fire then that would be a different story, but withstanding those - or imposing that qualification the answer is - well, I forgot now how you phrased it, but the answer is that I saw no evidence that would be.. or, no injuries, or other findings that would be consistent with a torture."

Dr. Dawson on page 148 of the transcript further explains his opinion:

> "Q. What is your conception of torture, doctor?
>
> A. Well, I don't know that I've ever tried to answer that, that might be difficult to answer.

I think from the standpoint of this sort of work that I would be involved in, that is the examination of people who die as a result oftentimes of traumatic injury that my answer would have to be something which causes pain or injury which is less than fatal over a period of time which is more than, let's say, a few short minutes, that is something which is prolonged which is designed to injure - or let me rephrase that - which is prolonged, which is designed to cause pain and which may result in injury... injuries which at least at the outset are not sufficient to cause death."

Dr. Dawson testified further that although the body of Jackie Morris had been burned, that this was done after death and therefore could not be considered a torture to the victim or aggravated battery (T-143). Dawson's testimony further raised the reasonable conclusion that although Morris was shot at least three times, two shots were fired in the head of the victim and that if either of those two shots were fired first, the victim was rendered unconscious rapidly and had no conscious sense of further pain (T-136, 137, 143-144). The state having the burden of showing the existence of this aggravating circumstance beyond a reasonable doubt, the evidence fails to exclude the reasonable hypothesis that Morris was shot in the head

initially and thereafter had no conscious pain or suffering, regardless of subsequent shots.

The presumption of innocence of all is so strong that every reasonable doubt must be resolved in favor of the accused if there is any fact or circumstance that is susceptible of two interpreations. Johnson v. State, 13 Ga. App. 586. Where the facts and evidence and all reasonable deductions therefrom present two theories, the justice and humanity of law compel the acceptance of the theory consistent with or favoring the defendant. Patrick v. State, 75 Ga. App. 687; David v. State, 13 Ga. App. 142.

Because the State believes that the victim might have been shot first in the neck and suffered before the fatal shots were fired to the head raises suspicion of torture but does not exclude the reasonable hypothesis that the shot to the victim's neck occurred after the shot or shots to the head resulting in unconsciousness, and will not support this aggravating circumstance. Burkhalter v. State, 125 Ga. App. 386.

Furthermore, the evidence shows that the Appellant shot the victim while intoxicated (T-187, 188, 201, 209, 223, 227, 269, 291, 322, 364, 413, 410) over an argument with the victim (T-43) concerning the method of stripping and burning of the victim's car and concerning the recollation of prior misdeeds of the victim against the Appellant (T-414). An examination of the transcript of evidence of this case in comparison with other cases where the death penalty was invoked and upheld shows a

distinct lack of facts and evidence supporting a showing or an outrageously or wantonly vile, horrible, or inhuman murder. This case simply does not warrant the imposition of the death penalty sentence. Ga. Code Ann. §27-2537(c)(2)(3); Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909.

The lower court erred in not directing a verdict or granting the motion for judgment notwithstanding the verdict for a life sentence, and the error should be corrected by this Court.

4.

By enumeration of error numbered 4, Appellant assigns as error the lower court's ruling allowing extensive evidence concerning escape and unrelated prejudicial events remote in time to the crime which injected prejudice and bias into the case and wrongfully brought the Appellant's character into evidence. (T-34, 37, 325, 327, 328, 356, 361-363).

Testimony concerning jail conditions (T-325), concerning Appellant's plans for escape (T-326), and concerning "how he (Appellant) felt about being shot" (T-361-363) went far outside of the use of escape testimony to show the guilt of the accused. Allen v. U.S., 164 U.S. 492.

This testimony flagrantly violated the rule of evidence forbidding introduction of evidence of other crimes of the accused to show bad character. Robinson v. State, 62 Ga. App. 355. It injected prejudice and bias into the case which was reflected by the sentence of the Court. The testimony was too remote to

have any probative value or relevancy to the charge being tried, and as such should have been excluded on that basis. Ludwig v. J.J. Newberry Co., 78 Ga. App. 871. This error should be corrected by this Court.

5.

By enumeration of error numbered 5, Appellant assigns as error the introduction of photographs of bodies of Hoyt Turner and Jackie Morris over objection by Appellant. The introduction of these photographs was totally irrelevant and immaterial since Appellant had admitted his guilt as to Jackie Morris, and the photographs graphically illustrated not his guilt, but his attempt to dispose of the body by burning it in an automobile. The effect of these photographs is to arouse the prejudice, passion, and bias against the Appellant, and they should not have been admitted (T-29, 33, 47, 51, 57, 60-64, 74-76, 78, 108, 129). Wilson v. State, 9 Ga. App. 274.

These photographs added nothing except the visual image to the mental image already produced by voluminous testimony concerning the events which led up to and caused the death of Jackie Morris.

The use of the numerous photographs of the dead bodies of both Hoyt Turner and Jackie Morris injected prejudice, bias, and irrelevancy into the case, which photographs were timely objected to, and were reflected in the sentence of the Court. The lower court erred in allowing these photographs into

evidence, and this error should be corrected by this Court. Eiland v. State, 130 Ga. App. 428.

6.

By enumeration of error numbered 6, Appellant assigns as error the Court's imposition of the death penalty without consideration of the Appellant's intoxication at the time of the commission of the crime as a mitigating factor. The trial court in his report to this Court (R-3) indicated that there were no mitigating factors to consider

But the evidence and testimony indicate that subsection (g) of that report was clearly present in the evidence as to intoxication. Becky Nations testified (T-187) that she and the Appellant had been drinking before they went to the party in Habersham County that day, and that he was as drunk as she was (T-188), having drunk a quart of liquor between them (T-189). Dexter Thomas testified that the drinking continued, and that several hours later in Habersham County the Appellant was still drunk (T-201). On the way back to Gainesville later, Thomas continued to describe the drinking of the Appellant (T-209).

Later testimony (T-223) indicated Appellant was mixing beer with liquor he had already consumed that day. In fact, this witness testified (Thomas) that Appellant drank continuously while he was driving (T-227).

Sheryl Land testified that everyone including the Appellant was drinking that night (T-269), and Highfield stated

that Appellant was drunk when he switched cars after arriving in Gainesville, minutes before shooting Morris (T-291, 322).

To impose the death sentence and to declare "I find beyond a reasonable doubt that there were aggravating circumstances as charged necessitating the imposition by this Court of the death penalty which I now impose" (R-102), ignores the mitigating circumstances of the testimony which are relevant to the Appellant which must be considered before imposing the death penalty. Fleming v. State, 240 Ga. 147.

To state that the finding of aggravating circumstances "necessitates" the death penalty completely ignores the principle of law that a life sentence would still be authorized under Thomas v. State, 240 Ga. 403.

Imposition of the death penalty without consideration of mitigating factors and without consideration of the rule of law in Thomas v. State is error, and should be corrected by this Court.

7.

As is accurately reflected in the report of the trial judge in this case, the basic right permitting a defendant to withdraw his guilty plea prior to pronouncement of judgment was codified in Cobbs Digest of the Laws of the State of Georgia in 1851 (R-12). Every Code beginning with the 1863 version has contained substantially the words which now appear as part of the present Code in Section 27-1404. This Code Section permits

a defendant to withdraw the plea of guilty "at anytime before judgment is pronounced". Ga. Code Ann. §27-1404.

Critical to a determination of when a sentence is "pronounced" is an examination of the origin of the definition of the word "pronouncement".

Three principal cases reveal the origin of the definition of the word "pronouncement" and trace the evolution of the right to withdraw the guilty plea before pronouncement. Upon reading the earlier cases, it becomes clear that the rule allowing a defendant the absolute right to withdraw his guilty plea at anytime before sentence is pronounced stems from old civil cases holding that a party may amend his pleadings anytime before judgment is entered.

The first case dealt with an appeal of a trial court's denial of a motion to amend a bond in a foreclosure proceeding. Lytle v. De Vaughn, 81 Ga. 226 (1888). De Vaughn foreclosed a mortgage upon certain personal property of Lytle. Fi fa issuing upon the foreclosure was levied on the property. Lytle filed an affidavit of illegality upon various grounds. He also gave a replevy bond. When the issue made by the illegality was called for trial, plaintiff moved to dismiss the illegality due to irregularities and errors contained in the bond. The Court announced that the motion was sustained, but before any entry thereof was made, defendant moved for leave to amend the bond so as to make it comply with the statute, which amendment was refused, Lytle, supra, pp. 226, 227. The judgment of the trial

court refusing the amendment was reversed. The Supreme Court held:

> "But it is said the offer was too late. We think it was in time, for although the court had announced orally that the motion of the opposite party to dismiss the illegality was granted, no order of dismissal had been entered, or sofar as appears signed, or even drawn up. The record indicates, or affords ground for inferring, that the offer was instant and immediate upon the oral announcement made by the court of its decision. That announcement, the court being one of record, did not terminate the case; it remained pending in court to await the preparation and entry of the final order or judgment." Id., p. 228.

It is significant to note at this point that in Appellant's case before this Court, his (Appellant's) withdrawal of guilty plea "was instant and immediate upon the oral announcement made by the Court of its decision."

The second case in the evolutionary chain is Freeman v. Brown, 115 Ga. 23 (1902). This was a suit against the administrator of a will to cover amounts due certain legatees.

Plaintiff moved to amend his petition before the court stenographer had finished transcribing the decision of the court and before the decision was signed by the court. The Supreme Court in Freeman held:

> "The oral announcement of the judge was no judgment, neither were the shorthand notes of the stenographer or the matter and language of this oral announcement the judgment of the court, and certainly the uncompleted transcription of these notes into longhand was no judgment. What the judge orally declares is no judgment until it has been put in writing and entered as such." Id., p. 27.

The third principal case and first criminal case in the evolutionary chain is Easterling v. State, 14 Ga. App. 134 (1912). The issue in Easterling was whether the oral announcement of the trial judge, on the hearing of a motion for new trial, amounted to a judgment from which an appeal could be entered. The court held:

> "A judgment is the decision or sentence of the law, pronounced by the court and entered upon its docket, minutes, or record. A judgment of a court can only be shown by its records. Where there is no record, there is no judgment." Id., p. 135.

The Easterling court concluded from the Lytle and Freeman decisions that the mere oral announcement by the trial judge on the hearing of the motion for new trial, that the motion would be overruled, was not a judgment. Easterling, supra, p. 136. The court significantly noted that the judgment had not been signed by the judge, nor had a judgment been entered on the minutes of the court.

From the trilogy of cases discussed above has evolved the rule which has been followed in substantially every criminal case dealing with the plea withdrawal issue since 1912.

The question in Rutland v. State, 14 Ga. App. 746 (1914) was basically whether it was within the power of a judge of the superior court, after the adjournment of the term at which the sentence was imposed, to alter or amend a sentence entered upon the minutes of the court. With respect to the point as to the legal validity of the so-called oral sentence, the Rutland court held:

> "That this point has since been expressly ruled upon in Freeman v. Brown," Rutland, supra, p. 751.

In Matthews v. Swatts, 16 Ga. App. 208 (1915), a habeas corpus proceeding, the Court of Appeals again cited approvingly the language of Easterling and Freeman, supra:

"It is well settled that oral announcements of a judge are no part of his judgment in a case." (p. 209).

In Morgan v. Mount, 195 Ga. 281 (1943), a habeas petitioner proclaimed that his sentence did not conform to the oral statements of the trial judge. It was held in Morgan that oral testimony could not have the effect of changing the legal sentence as put in writing and signed by the judge, since it was the signed writing, and not the previous oral announcement, which constituted the legal sentence (p. 281).

The true rule was succinctly stated by the Georgia Court of Appeals in Clark v. State, 72 Ga. App. 603 (1945) wherein the Court held:

"In the superior court an oral announcement by the judge as to what sentence will be imposed is not a pronouncement of the sentence within the contemplation of the statute."

One year after Clark, supra, the Georgia Supreme Court likewise held that oral declarations of the judge constitute no part of the sentence until they have been put in writing and duly entered as such. Long v. Stanley, 200 Ga. 239, 241 (1946).

In 1947, relying on Clark and Long, among others, supra, the Court of Appeals with definity stated the meaning of

"pronouncement" as it appears in Code 27-1404:

> "The pronouncement upon the prisoner of the judgment of the law, as provided for in 27-1404 of the Code, consists of the signing of the written sentence by the presiding judge and its delivery to the clerk for the record, and any oral announcement by the judge as to what the sentence is to ve is no part of such pronouncement." Wright v. State, 75 Ga. App. 764.

More recent cases are in accord with Clark, Long, supra, and the other earlier cases. Farmer v. State, 128 Ga. App. 416 (1973); Ballard v. State, 131 Ga. App. 847 (1974); Williams v. State, 148 Ga. App. 521 (1978). Denial of absolute right of defendant to withdraw guilty plea constitutes reversible error.

Particularly noteworthy about the Ballard case, supra, is the similarity to the instant fact situation as it existed at the time of sentencing. In Ballard, the defendant attempted to withdraw a guilty plea to the offense of unauthorized entry of a dwelling house. The trial court refused the motion and stated that he had signed the judgment before announcing sentence so that it could not be withdrawn, Id., p. 848, 849. Held, the trial court clearly intended to cut off the right of the defendant to withdraw the plea. Id., p. 849.

Along the evolutionary chain there appears to be, at first glance, some "rusty links" which might cause some confusion. However, upon careful examination of those rusty links, the "rust" of those cases dissolves and the chain emerges untarnished.

One such "rusty link" is the case of Griffin v. State, 12 Ga. App. 615 (1913). Griffin held that judgment is pronounced within the purview of Code 27-1404 whenever the defendant is officially informed by the court of the sentence to be entered against him. This case involved plea bargaining between the State and defendants. Based on the "bargain" the defendant pled guilty. The trial court subsequently imposed a harsher sentence. On appeal, although the Court of Appeals reversed the trial court, it did so because the Court of Appeals felt that the defendants' mistaken belief that they would get a lesser sentence on a plea of guilty, was not such negligence on their part as to deprive them of a right to a jury trial. Id., p. 630. The language of the Griffin case could easily be confused and construed to mean that "pronouncement" under Code 27-1404 means oral announcement. Such is clearly not the case as was demonstrated in Clark v. State, supra.

> "It is well to note in this case (Griffin) the court was dealing with the question of withdrawing a plea of guilty after a written sentence had been signed and pronounced. That is not the question here." Clark, supra, pp. 611, 612.

Another "rusty link" is the case of Sanders v. State, 18 Ga. App. 786 (1916). In Sanders, as in Griffin, it appears that a legal sentence had been pronounced before the motion to withdraw the plea was made. Of the Sanders case it is said in the Clark case, supra, p. 613, that:

> "The first headnote reads: Where the record conflicts with the bill of exceptions, the record controls. This court held in that case that although the bill of exceptions recited that the defendant moved to withdraw his plea of guilty before a written sentence was pronounced upon him, the sentence itself contradicted such allegation in the bill of exceptions. The court held that the record, that is the sentence, was controlling and not the recitals of fact in the bill of exceptions. Hence, it follows that anything which the court might have said in the second headnote of that opinion is obiter dictum."

If Griffin and Sanders stand, which they clearly do not, for the proposition that Code 27-1404 does not permit defendants to withdraw their guilty pleas once they are told of their sentence, then these two cases are clearly not correct inasmuch

as they fly directly in the face of the overwhelming majority of cases on the issue. At a minimum, such a rule, if it exists, has been necessarily overruled by implication.

Thus, having reviewed the law with regard to withdrawal of a guilty plea, it is readily apparent that Appellant complied with the law as it currently exists in Georgia. Immediately after the trial judge orally announced the sentence, Appellant's counsel both orally (T-484) and in written form (T-487, R-9-22) withdrew Appellant's plea of guilty. Both the oral and written withdrawals were accomplished prior to the trial judge handing the sentence to the Clerk. The trial judge himself, contrary to remarks from the District Attorney, acknowledged the fact that Appellant's withdrawal of guilty plea both in written form and orally, was accomplished prior to the Clerk receiving the written sentence of the Court:

> "For the record counsel for the defendant placed on the Clerk's desk just a fraction of a second before I handed my written sentence to the 'Court' apparently his withdrawal, and started what I consider to be an unauthorized shouting type of interruption of the court." (T-490).

It is therefore unalterably true that the trial court erred in denying Appellant's withdrawal of guilty plea.

The sentencing phase of Appellant's case is not too dissimilar from what occurred in Ballard v. State, supra. As in Ballard, the trial judge here had deliberately signed a sentence written out in its entirety "anticipating that counsel for the defendant would have to take this into consideration" (T-490) clearly intending to cut off the right of Appellant to withdraw the plea. See Ballard at p. 849.

With respect to the trial judge's argument that Appellant's counsel acted contrary to Local Rule 70.6 (T-490), that rule provides:

> "In all criminal felony cases in which pleas of guilty have been entered, the plea of guilty may be withdrawn only in open court before the judge who received the plea of guilty. Until and unless a plea of guilty is withdrawn, the case in which the plea of guilty has been entered shall not be presented to any other judge for disposition."

There is no requirement in Local Rule 70.6 that counsel be "properly before the court," and even if there was a requirement, there is nothing in Code 27-1404 which requires Appellant, his counsel or anyone else to be properly before the Court prior to withdrawing a guilty plea. If in fact Local Rule 70.6 requires such a condition, then Local Rule 70.6 is in contravention of a general statute on this same subject and as such,

Local Rule 70.6 is invalid, Ga. Code Ann. §2-401 (Rev. 1948).

Finally, assuming that the law as it currently exists in Georgia with respect to withdrawal of guilty pleas allows the accused to trifle with and play games with the Court (T-485, 486), it is not for the appellate courts to change, but the legislature.

In Burkett v. State, 131 Ga. App. 177 (1974), the Court of Appeals held:

> "The rule in most jurisdictions is that one who enters a plea to an accusatory pleading does not have the absolute right to withdraw a plea; the granting or refusing of leave to withdraw a plea in a criminal case rests in the sound discretion of the trial judge, subject to review for abuse of discretion. However, in Georgia this common law power of the trial judge was taken away from him by the General Assembly, and an accused has the right to withdraw the plea prior to judgment...
>
> The District Attorney makes a very logical argument against the above rules saying that it allows the accused to trifle with and play games with the court. The answer is that the law on this question is not simply what the judges of this court think the law should be, but what the General Assembly said it is... Horton v. Brown, 117 Ga. App. 47, 49."

In accord with Burkett, supra, is Williams v. State, 148 Ga. App. 521, 522 (1978):

> "This Court recognizes that an unscrupulous defendant may occasionally utilize his right to withdraw his guilty plea in an attempt to gain an unwarranted delay in the trial of his case... However, we feel that the intent of the legislature in establishing the present statutory procedure must be closely adhered to."

However, assuming this Court is inclined to change the law as it currently exists in Georgia with regard to withdrawal of guilty pleas, Williams v. State, supra, such change should apply prospectively only and not retroactively. Appellant should be permitted to rely on the law as it existed at the time he withdrew his plea of guilty. Anything short of this would have the effect of abridging Appellant's vested or substantive procedural rights. An analogy can be made here with respect to the award of attorney's fees and expenses as additional damage in condemnation cases. The Court in Department of Transportation v. Worley, 150 Ga. App. 768, 769 (1979) affirmed the rule that owners in condemnation cases have vested rights to just and adequate compensation which cannot be destroyed by applying the law existing as of the date of the appeal to a case

that has already been tried. If there are any rights afforded a criminal defendant with respect to verdict and sentence, they belong first to the capital defendant.

8.

Inasmuch as the trial court erred in refusing to allow Appellant to withdraw his guilty plea as a matter of right (see Enumeration of Error No. 7), when given the opportunity to exercise his discretion and grant Appellant's motion to withdraw his guilty plea, said trial court abused its discretion by denying said motion.

As additional evidence of abuse, Appellant would refer to the voluminous amount of immaterial evidence the trial court admitted over objection of Appellant's counsel (see Exhibit "A" attached hereto). Appellant, by his plea, was not attempting to shield the trial court from any relevant evidence, however, the evidence admitted over objection (Exhibit "A") had no probative value insofar as the punishment phase of the case was concerned. Appellant does not debate the "rightness or wrongness" of his decision to plead guilty, however, having done so Appellant and his counsel were concerned only that the case be properly conducted with only relevant and material evidence introduced. The trial court by admitting voluminous evidence with no probative value, "stacked the deck" against Appellant so as to strip Appellant's plea of guilty of whatever beneficial effect it could or should have had.

9.

The trial court erred in denying Appellant's oral and written motions for an evidentiary hearing with respect to what transpired at Appellant's sentencing hearing. (R. 9-22).

It is clear from Georgia statutory and case law as well as the Eighth Amendment to the United States Constitution that the fulfillment of the right to appeal is dependent on a reliable, complete record of the case below. Indeed, before a death sentence can be reviewed for its constitutionality or for any other purpose, it goes without saying that there must be a complete record for the appellate courts to review.

In all felony cases the transcript of evidence and proceedings shall be reported and prepared as provided by law. Ga. Code Ann. §6-805(a).

Where a trial in any civil or criminal case is reported by a court reporter, all motions, colloquies, objections, rulings, all evidence - whether admitted or stricken on objection or otherwise - copies or summaries of all documentary evidence, the charge of the court, and all other proceedings which may be called and questioned on appeal or other post-trial procedures shall be reported, and where the report is transcribed, all such matters shall be included in the written transcript, it being the intention of this law that all these matters appear in the record, rather than in assignments of error on appeal or otherwise, which are abolished by this law. Where matters occur

which were not reported, such as objections to oral argument, misconduct of the jury, or other like instances, the court, upon motion of either party, shall require that a transcript of these matters be made and included as part of the record... Code Sec. 6-805(d).

Where any party contends that the transcript or record does not truly or fully disclose what transpired in the trial court and the parties are unable to agree thereon, the trial court shall set the matter down for a hearing with notice to both parties, and resolve the difference so as to make the record conform to the truth. If anything material to either party is omitted from the record on appeal or is misstated therein, the parties by stipulation, or the trial court, either before or after the record is transmitted to the appellate court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected, and, if necessary, that a supplemental record shall be certified and transmitted by the Clerk of the trial court. Code Sec. 6-805(f).

Thus, under the authorities stated above, if, in fact, the withdrawal of guilty plea procedure is a "race to clerk" affair as the case law indicates, then defense counsel should have the opportunity to call witnesses who would testify as to who did what and when, especially when such a motion was orally made (T-491, 495-496) and denied at the sentencing hearing in this case.

It is significant to note that the trial court stated that he would allow Appellant's counsel an opportunity to later perfect the record in regard to when the withdrawal was made in relation with the filing of the sentence. (T-491). Further, the District Attorney is in total agreement with Appellant's counsel that Appellant is entitled to an evidentiary hearing with respect to the guilty plea withdrawal (R-125). The District Attorney differs with Appellant's counsel on this point only in regard to which judge should preside at the hearing (R-125).

Therefore, for the reasons assigned herein, the trial court erred in denying Appellant's motions for an evidentiary hearing.

10.

The trial court erred in denying Appellant's motion for new trial (R-139, 140).

Appellant entered a plea of guilty to the charge of murder in Hall County Superior Court, Gainesville, Georgia, being indictment number K-45668, on August 14, 1979 (R-90, 91). Before sentence was pronounced and entered, Appellant withdrew his guilty plea on August 16, 1979 (T-484, 487). The trial court denied Appellant's withdrawal of guilty plea and proceeded with the entry of the sentence, that being the imposition of the death penalty (T-491). Appellant subsequently moved for a new

trial which motion was denied (R-149, 150).

The trial court erred in denying Appellant's motion for new trial for the reasons that the judgment of the Court as a fact finder on the issue of punishment was contrary to law, the judgment of the Court as a fact finder on the issue of punishment was contrary to the evidence, the judgment of the Court as a fact finder on the issue of punishment was strongly against the weight of the evidence, and the judgment of the Court as a fact finder on the issue of punishment failed to consider that the Court was not compelled under the law, as was stated by the Court (T-494), to impose the death sentence upon the Appellant. Further, the trial court erred in denying Appellant's motion for new trial for the reason that the guilty plea was effectively withdrawn by Appellant before pronouncement and entry of sentence by the Court (T-484, 487, 490).

CONCLUSION

For the reasons assigned herein, Appellant respectfully requests that this Court grant Appellant a new trial or, in the alternative, overturn the death penalty which was imposed on Appellant by the trial court.

George W. Brinson

George W. Brinson

Michael R. Casper

Michael R. Casper

ATTORNEYS FOR APPELLANT

EXHIBIT "A"

(1) Motion in Limine - T.22, ruling reserved - T.29.

(2) Motion in Limine - (Photos of Hoyt Turner) T.29, ruling reserved - T-33.

(3) Objection by Appellant as to any matters pertaining to Habersham County indictment - T.65, overruled - T.72, (the Court allowed this objection to be continuing, T.72).

(4) Objection (photos of Belton Bridge) - T.74, overruled T.75.

(5) Objection (photos of pickup truck) - T.76, overruled - T.78.

(6) Objection as to Habersham County evidence - T.93, overruled T.93.

(7) Objection (photos - Whitlock trailer) - T.103, overruled T.103.

(8) Objection (Turner autopsy report and testimony) - T.105, overruled T.105.

(9) Objection (Turner photos) - T.108, overruled T.108.

(10) Objection (medical testimony - Dr. Dawson) - T.111, overruled T.111.

(11) Objection (Turner autopsy report and testimony) - T.114, overruled T.114.

EXHIBIT "A"

(12) Objection (pathologist's testimony as to angle of bullet in Turner) - T.124, overruled T.124.

(13) Objection (Habersham County photos) - T.128, overruled T.128.

(14) Objection (Exhibit 41, bullets from Turner) - T.161, overruled T.161.

(15) Objection (Nations' testimony re Habersham County) - T.167, overruled T.167.

(16) Objection (testimony re Habersham County) - T.200, overruled T.200.

(17) Objection (Land testimony re Habersham County) - T.252, overruled T.252.

(18) Objection (Habersham County testimony) - T.292, overruled T.292.

(19) Objection (Threatt's testimony relating to Habersham County) - T.332, overruled T.332.

(20) Objection (Marable's testimony concerning Habersham County) - T.359, overruled T.359.

In The Superior Court
of Habersham County
Ga.

State of Ga
vs.
Keith Fair No _____

Verdict

We find the Defendant
Not Guilty

This 16th Day of Nov. 1979

Gertrude B. O'Hare
FOREPERSON

GEORGIA, HABERSHAM COUNTY
This is [illegible] within document
is a true [illegible] on file
in this [illegible]

This 21 [illegible] Nov. 1979
[illegible]
Clerk, Superior Court

GEORGIA, HABERSHAM COUNTY.

The grand jurors selected, chosen, and sworn for the County of HABERSHAM to-wit:

1. Mrs Curtis Stinespring Jr.
2. Malin Roger Bentley
3. Wiles Barrett
4. Tim Terrell Craven
5. John H. Mucks
6. Bomar Amos Olds, Jr.
7. F. Lee Sellers, Jr.
8. Billy Barrett
9. Larry Clark Parham
10. Harry F. Purvis
11. James R. Acrey
12. Fred Scroggs
13. Mrs Herman (Linda) Benfield
14. Mrs. L. R. Holbrook
15. Mrs L. Y. Drew
16. Howard Clyde
17. Robert L. Hawkins
18. Cole Allen
19. Charles E. Barrett
20. Stanley Knight
21. Cortez Farrell
22. Charles Roy Davis
23. Ronald J. Parham

in the name and behalf of the Citizens of Georgia, charge and accuse KEITH FAIR

of the County and State aforesaid, with the offense of MURDER

for that the said KEITH FAIR

on the 8th day of MAY in the year 19 79, in the County aforesaid, did unlawfully

and with malice aforethought kill one Edmond Hoyt Turner, a human being, by shooting the said Edmond Hoyt Turner with a certain pistol,

GEORGIA, HABERSHAM COUNTY
This is to certify that the within documen[illegible] is a true and correct copy of the original on f[illegible] in this office.
This 26th day of Nov. 1979
Ernest W. Nationig[illegible]
Clerk [illegible] Cou[illegible]

contrary to the laws of said State, the good order, peace and dignity thereof.

Superior Court of said County AUGUST TERM, 19 79

H. D. STOCKTON, DISTRICT ATTORNEY

The Defendant _____ waives being formally arraigned and pleads not guilty.

This 12 day of November 1979.

_____ District Attorney

Copy of bill of indictment and list of witnesses sworn before Grand Jury waived before arraignment.

_____ Defendant's Attorney

_____ Defendant

WITNESSES

EY L. THOMPSON, GBI ✓

STOWE, GBI ✓

ATTAWAY, HALL CO. S.D.

N WHITLOCK.

R SEGERS

R THOMAS ✓

ILL LAND 11-16-79

A NATIONS

YON DAWSON, CRIME LAB

PITTS

Turner

Fite

Wallraven

n P. Threatt

Ray Pearson

l Marable

a- 8-14-79

ed- 8-9-79

HABERSHAM

SUPERIOR COURT

TERM, AUGUST 1979

THE STATE

vs.

KEITH FAIR

MURDER (26-1101)

True Bill

Harry D. Purvis Foreman

V.D. STOCKTON, DISTRICT ATTY.

ROBERT F. PITTS Prosecutor

CERTIFICATE OF SERVICE

I, GEORGE W. BRINSON, do hereby certify that I have furnished a copy of the foregoing Brief of Appellant, by mail, to:

Honorable Jeff C. Wayne
District Attorney, Northeastern
Judicial Circuit
P. O. Box 1690
Gainesville, Georgia 30503

and

Honorable Arthur K. Bolton
Attorney General
Room 132, Judicial Building
Atlanta, Georgia 30303

in a properly addressed envelope with sufficient postage thereon to carry same to its destination.

This 26 day of November, 1979.

George W. Brinson
GEORGE W. BRINSON

APPENDIX B - OPINION OF THE GEORGIA SUPREME COURT

In the Supreme Court of Georgia

Decided: APR 09 1980

35701. FAIR v. STATE

BOWLES, Justice.

Keith Fair, the appellant, pled guilty in the Superior Court of Hall County to the murder of Jackie Morris. The trial judge, after a two day pre-sentence trial, found the existence of two statutory aggravating circumstances and imposed the death penalty. The case is here on direct appeal.

This case involves two killings by appellant. The trial judge, as the finder of fact, was authorized to find that the first killing occurred in Habersham County as a result of a dispute over a money matter. Apparently the Habersham County victim had hired appellant to burn a trailer for him and then did not have the money to pay. In front of his other accomplices, including Jackie Morris, hereinafter the Hall County victim, appellant shot the Habersham County victim at point blank range in the face, then threw him on the ground and shot him again, laughing all the while. The body was disposed of in Lake Lanier.

Later that night, appellant determined that the Hall County victim would have to be killed as well since he had been a "rat" in prison. Appellant pretended to need help with a wheel on an automobile and when the victim leaned over to help, appellant shot him in the head, laughing and saying, "you wasn't nothing but a rat you son-of-a-bitch no way, you pulled a knife on me when I was thirteen years old and scared the hell out of me." The body was placed in the car; the victim's throat was cut by another accomplice; and the car was set on fire.

After his arrest, the appellant bragged about the killing of the Hall County victim to other inmates. He also stated that when he got out he was going to kill the other witnesses. In conversation with other inmates he said that he was not sorry about the killing and did not lose any sleep over it. Appellant escaped from jail with another inmate to whom he admitted both killings. During the period he was a fugitive, he told the inmate he escaped with that the victims were criminals like him and deserved it but that he did not want to be shot because when he shoots people they "squeal like it hurts." Appellant was re-captured within a day and a half.

1. The appellant attacks the constitutionality of the Georgia Death Penalty Statute, Ga. Laws, 1973, pp. 159, et. seq. (Code Ann. § 27-2634.1) as written and applied. Both this court and the Supreme Court of the United States have upheld the constitutionality of the Georgia statute in a number of cases and appellant has advanced no new reason for us to reconsider our position. See Gregg v. Georgia, 428 U. S. 153 (1976); Eberheart v. State, 232 Ga. 247 (206 SE2d 12) (1974); McCorquodale v. State 233 Ga. 369 (211 SE2d 517) (1974); Smith v. State, 236 Ga. 12 (222 SE2d 308) (1976); Mason v. State, 236 Ga. 46 (222 SE2d 339) (1976); Birt v. State, 236 Ga. 815 (225 SE2d 248) (1976); Legare v. State, 243 Ga. 744 (257 SE2d 247) (1979). Appellant's first enumeration of error is without merit.

2. The appellant in his second enumeration of error argues that the trial court erred in admitting evidence of the murder of the Habersham County victim and relying upon that evidence in its finding of one of the statutory aggravating circumstances warranting the death penalty.

Appellant was given proper notice that the evidence of the Habersham County murder would be tendered in aggravation. At the

pre-sentence trial, his appointed attorney in the Habersham County case advised appellant to assert his Fifth Amendment privilege as to any question concerning the first murder. However, this in itself would not have prevented appellant from presenting evidence in defense of the Habersham County murder before the trial court in the instant case. The appellant had to choose which course to follow. Though a defendant may have a right, even a constitutional right to follow a certain course of action, it does not necessarily follow that to require him to choose a course of action is constitutionally forbidden. Decisions as to what course to follow in a criminal case are many times difficult. See McMann v. Richardson, 397 U. S. 759 (1970). The appellant contends that the evidence of the Habersham murder should not have been introduced against him in aggravation because he had only been charged with that murder, had not been convicted, but was awaiting trial thereon. It is the rule in this state that it is not required that a defendant be convicted of the crime introduced as an aggravating circumstance. Hooks v. State, 233 Ga. 151 (210 SE2d 688) (1974); Collier v. State, 244 Ga. 553 (261 SE2d 364) (1979). Appellant's reliance upon Code Ann. § 27-2534.1(b)(1) is

misplaced in that the record clearly shows that the state relied upon and the trial court found that the murder occurred during the commission of another capital felony. Code Ann. § 27-2534.1 (b) (2).

Appellant further argues that the evidence was totally irrelevant and, therefore, inadmissible. We do not agree. The first murder was committed within hours of the second. The motive for the murder of the Hall County victim was to silence him so he would not be able to testify against the appellant regarding the first murder. The arson of the trailer, the murder in Habersham County, the murder in Hall County and the arson of the car in Hall County were all part of a continuous transaction and all were mutually dependent crimes. Collins v. State, 239 Ga. 45 (235 SE2d 523) (1977); Stewart v. State, 239 Ga. 588 (238 SE2d 540) (1977). Had the appellant plead not guilty and elected to go to trial on guilt-innocence, the evidence complained of would have been admissible to show scheme, motive, or intent. McClesky v. State, 245 Ga. 108 (SE2d) (1980). It, therefore, follows that such evidence was certainly admissible during the presentence trial in which additional evidence, not admissible

during the guilt-innocence phase, is allowed. Code Ann. § 27-2503. See, Spivey v. State, 241 Ga. 477 (246 SE2d 288) (1978). Furthermore, such evidence is not inadmissible on the ground that it places the defendant's character in evidence. During the pre-sentence hearing, the State, subject to notice limitations, is allowed to place the defendant's character in issue through his prior record or other criminal acts. Code Ann. §§ 27-2503; 27-2534.1. A defendant in a capital case stands before the trial court or jury in a pre-sentence trial a convicted felon with no presumption of innocence. All aspects of his crime or crimes, his character and his attitude are admissible, subject to the applicable rules of evidence regarding reliability, to guide the fact finder in determining appropriate sentence. See, Lockett v. Ohio, ____ U. S. _____ (98 S. C. 2954) (1978); Collier v. State, supra.

Appellant asserts that the trial court's finding that the offense of murder occurred while the offender was engaged in another capital felony: to-wit, the murder of the Habersham County victim, cannot stand because at his subsequent trial for that offense in Habersham County, the appellant was acquitted.

Appellant's subsequent acquittal is not part of the record in this case. Nevertheless, assuming such an acquittal, we find no error. Necessarily, two different triers of fact were involved. Different triers of facts may reach different results. See, Chaffin v. Stynchcombe, 412 U. S. 17 (1973). Under our statute, the fact finder in a pre-sentence trial must determine whether beyond a reasonable doubt any of the statutory aggravating circumstances exist under the evidence presented. Code Ann. §§ 27-2503; 2525, 2534.1. A review of the evidence presented to the trial judge in this case overwhelmingly supports a finding by a rational trier of fact that the appellant was engaged in the commission of another murder when he killed the Hall County victim. Jackson v. Virginia, ____ U. S. _____ (99 S. Ct. 2781) (1979).

In the instant case, the murders were committed in separate counties which of necessity required that one murder be tried before the other.[1/] The subsequent acquittal simply has no bearing on the issue of whether the trier of fact is presented with sufficient evidence to find beyond a reasonable doubt the existence of an aggravating circumstance.

1/ What evidence may have been presented in the second murder trial regarding the first homicide is not before the court, but we can unhesitatingly say that the evidence of the first homicide presented in the instant case was entirely sufficient to prove it.

3. The trial court also found an additional aggravating circumstance in that the murder of the victim in this case was outrageously and wantonly vile, horrible and inhuman in that it involved depravity of mind on the part of the defendant. The appellant argues that such a finding under Code Ann. § 27-2534.1 (b)(7) is incomplete in that the statute requires a finding of either torture or aggravated battery in addition to a finding of depravity of mind. Code Ann. § 27-2534.1(b)(7) provides as follows: "The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." The statute is worded in the disjunctive, not the conjunctive. It is not required that a trier of fact find the existence of each disjunctive phrase of the statute, only that at least one phrase of the first clause of the statute exists due to the existence of at least one phrase of the second clause of the statute. Furthermore, this court has upheld an identical finding of this statutory aggravating circumstance in Corn v. State, 240 Ga. 130 (240 SE2d 694) (1977).

The evidence supports a finding of this aggravating circumstance by a rational trier of fact beyond a reasonable doubt, Jackson v. Virginia, supra.

The evidence shows that the appellant killed his accomplice in an arson case who also happened to be a witness to a murder to prevent any chance the victim would testify against him. It was cold blooded, performed in a methodical, execution-type manner, and the body was burned to destroy any evidence against the appellant. The appellant laughed during the murder of his victim, cursed him and later told others he did not lose any sleep over the killing. He described how people "squealed" when he shot them. Such evidence shows a vile, inhuman murder due to a complete and absolute disregard for human life which is shocking to the conscience of civilized man. It cannot be argued that such actions on the part of the appellant do not evidence a complete depravity of mind. Appellant's third enumeration of error is, therefore, without merit.

4. In his fourth and eighth enumerations of error, the appellant argues that the court erred in admitting evidence of the subsequent escape from jail and his conversations with other inmates. The appellant contends the evidence is inadmissible because it places his character in evidence. As noted above, the instant case was a pre-sentence trial. The appellant admitted

his guilt in open court and waived any right to trial on guilt or innocence. The purpose of a pre-sentence trial is to introduce different evidence from that at trial to determine guilt or innocence. On the issue of guilt or innocence, the only relevant evidence is that which pertains to the offense with which the defendant is charged. In a pre-sentence trial the trier of fact must make a determination as to the sentence to be imposed, taking into consideration all aspects of the crime, the past criminal record or lack thereof, and the defendant's general moral character. Johnson v. State, 126 Ga. App. 757 (191 SE2d 614) (1972); Code Ann. §§ 27-2503, 2528, 2534.1. Any lawful evidence which tends to show the motive of the defendant, his lack of remorse, his general moral character, and his predisposition to commit other crimes is admissible in aggravation, subject to the notice provisions of the statute. Each case is necessarily different; however, such evidence, by way of illustration, may consist as it did here of the defendant's attitude concerning his crime and the victim, the trier of fact's personal observation of the defendant, his conduct after incarceration and evidence of subsequent crimes. See, Ingram v. State, 134 Ga. App. 935

(216 SE2d 608) (1975). In a capital felony pre-sentence trial, the State is not limited to the introduction of evidence to support the particular statutory aggravating circumstances it is relying upon. Upon review of the record, we conclude that the evidence was relevant to sentence and admissible. The evidence being admissible, the trial court did not abuse its discretion in failing to allow the withdrawal of the appellant's guilty plea on the ground that sentence was based upon erroneously admitted evidence.

5. In his fifth enumeration of error, appellant asserts error in the introduction of photographs of the bodies of his victims over objection. This enumeration is clearly without merit, especially in view of the fact that such evidence was presented to the trial judge sitting without a jury. Tucker v. State, 245 Ga. 68 (____ SE2d ____) (1979); Stevens v. State, 242 Ga. 34 (247 SE2d 838) (1978); White v. State, 242 Ga. 21 (247 SE2d 759) (1978); McCorquodale v. State, supra. See Ingram v. State, supra.

6. Appellant contends in his sixth enumeration of error that the trial judge did not consider the appellant's intoxication as a mitigating factor in imposing sentence. While it is undisputed

that the appellant was drinking intoxicating beverages on the day in question, there was no evidence presented which in any manner showed that the appellant was so intoxicated as to not be able to form the requisite criminal intent nor understand the nature of his actions. Tucker v. State, 244 Ga. 721 (261 SE2d 635) (1979). Plaintiff argues that the trial judge did not include intoxication to the extent of impairment of intent and ability to comprehend the criminality of his actions as a mitigating circumstance on the judge's report. However, this does not indicate that the judge failed to consider it as a possible mitigating circumstance.

The appellant relies on an isolated portion of the judge's sentence to show that the trial court failed to take into consideration any mitigating circumstances and sentenced solely on the basis that statutory aggravating circumstances were found, thereby requiring the imposition of a death penalty. Fleming v. State, 240 Ga. 142 (240 SE2d 37) (1972). However, a review of the record in this case shows that the judge considered all the circumstances both in mitigation and aggravation in arriving at his sentence. In fact, the trial judge recited that he considered all the evidence, both in aggravation and mitigation in his finding of

aggravating circumstances as required by Code Ann. § 27-2525. Spivey v. State, supra.

7. The appellant upon call of the case tendered a guilty plea. The trial court exhaustively examined the appellant to determine if the plea was voluntarily and intelligently given. The court thereafter informed the appellant and his counsel that the court was not conscientiously opposed to capital punishment and would impose such a sentence if the facts warranted it. The court then required the appellant to confer with his counsel and recessed for that purpose. Thereafter, the appellant again insisted on a guilty plea. A pre-sentence trial was held pursuant to Code Ann. §§ 27-2528, 27-2503 and 27-2534.1. The State introduced proof not only of the aggravating circumstances but of the crime itself. After the trial court made its findings of fact and orally announced sentence the appellant moved to withdraw his plea. Withdrawal came prior to the clerk receiving the sentence and spreading it upon the record. Appellant enumerates as error the trial judge's refusal to hold an evidentiary hearing to correct the record. However, the appellant's attorney was allowed to perfect the record, and the record adequately reflects the

attempt to withdraw the plea prior to the clerk's receiving it. Neither the trial judge nor the State contest appellant's assertion that the withdrawal came prior to the clerk's receiving the sentence. Appellant's ninth enumeration of error is without merit. See, Patterson v. State, 233 Ga. 724 (213 SE2d 612)(1975); Code Ann. § 6-805(f).

8. Appellant asserts error on the trial court's refusal to allow withdrawal of his guilty plea. The appellant contends that at any time prior to the sentence being received by the clerk and entered upon the docket, a defendant, as a matter of right, may withdraw his plea of guilty. Appellant cites as authority Code Ann. § 27-1404 and cases decided thereunder. Code Ann. § 27-1404 provides in relevant part as follows:

> "...If he shall plead 'guilty,' such plea shall be immediately recorded on the minutes of the court by the clerk, together with the arraignment; and the court shall pronounce upon such prisoner the judgment of the law, in the same manner as if he had been convicted of the offense by the verdict of a jury; but, at any time before judgment is pronounced, the prisoner may withdraw the plea of 'guilty,' and plead 'not guilty,' and such former plea shall not be given in evidence against him on his trial."[2/]

2/ The statute first appeared at page 834 in Cobb's Digest of the Laws of the State of Georgia published in 1851. Under the common law, a prisoner had no absolute right to withdraw his plea either before or after sentence. Therefore, the statute is in derogation of the common law. Woodward v. State, 13 Ga. App. 130 (78 SE 1009) (1913), dissent of Pottle, J.

The question thus presented is whether or to what extent Code Ann. § 27-1404 applies to Ga. Laws 1973, p. 159 et. seq. which provided for comprehensive new procedures in capital felony cases.

This is a question of first impression as guilty pleas are rare when the State has not waived the death penalty.[3/] From 1956 until the present death penalty statute, if a defendant plead guilty and such a plea was accepted, the maximum penalty that could be imposed was life imprisonment. Ga. Laws 1956, p. 737 (Former Code Ann. § 27-2528). However, under the new Act, there is no such limitation and the trial judge, provided he finds the existence of a statutory aggravating circumstance, may impose a death penalty. Ga. Laws 1973, pp. 159, 171 (Code Ann. § 27-2528).

The present death penalty statute, Ga. Laws 1973, p. 159 et. seq. created a comprehensive new procedure for the trial and imposition of the death penalty in capital felony cases. The statute requires a finding by the trier of fact of at least one specific statutory aggravating circumstance before a death sentence is authorized. The State must prove the existence of such an aggravating circumstance beyond a reasonable doubt.

3/ There are only three cases involving a plea which resulted in a sentence of death under the present statute; Hooks v. State, 233 Ga. 149 (210 SE2d 688) (1977); Moore v. State, 233 Ga. 861 (213 SE2d 829) (1975) and Mitchell v. State, 234 Ga. 160 (214 SE2d 900) (1975). These cases do not address the question.

The trial of a capital felony is, therefore, in two parts: one to determine guilt or innocence and the other to determine sentence. In both phases, the State carries the burden of proof. In a non-capital felony, the judge conducts a pre-sentence hearing to determine sentence and the State may tender evidence of aggravation if it so chooses, but no factual finding is required to authorize imposition of any sentence within the statutory limits. Code Ann. § 27-2503.

Against this background we must construe the two statutes in question, keeping in mind the legislative intent, the old law, the evil and the remedy. Code Ann. § 102-102.

The purpose of the withdrawal provision of Code Ann. § 27-1404 is to provide a necessary part of the plea bargaining procedure, Smith v. State, 231 Ga. 23 (200 SE2d 119) (1973). Its provisions have been held to apply to nolo contendre pleas, Wright v. State, 75 Ga. App. 764 (44 SE2d 569) (1947), but not to pleas which result in first offender treatment, Heath v. State, 148 Ga. App. 559 (252 SE2d 4) (1978), because to do so would frustrate the purpose of the First Offender Act.

Where a plea of guilty is entered in a capital felony case and the State seeks the death penalty under Code Ann. § 27-2534.1,

plea bargaining is not involved nor could it ever be involved. Therefore, Code Ann. § 27-1404 would have no purpose under such a circumstance. Furthermore, to apply Code Ann. § 27-1404 to such a situation would frustrate the purpose of Ga. Laws 1973, pp. 159, 171, in that the plea could be withdrawn as a matter of right after the defendant learns a death sentence has been announced. Therefore, under this construction a death sentence could never be imposed upon a guilty plea if the defendant wished to avoid it.

Where a plea of guilty is filed in a non-capital felony, the judgment does not rest upon the results of a trial, but upon the plea, which is nothing more than a confession in judicio. Code Ann. § 27-1404 provides that the court, "...shall pronounce... the judgment, in the same manner as if he had been convicted of the offense by the verdict of a jury." However, in capital cases, the judgment does not rest upon the plea but rather upon the plea and the proof of an aggravating circumstance except in rare cases of treason or aircraft hijacking.[4/] Code Ann. § 27-2534.1(a). Capital cases, therefore, require further proceedings in all but two instances, a procedure not envisioned by Code Ann. § 27-1404. The decision of the trial court after a sentencing trial is

4/ The reports contain no such cases under the new statute, in which a death penalty was given.

tantamount to a jury verdict. For this reason and the others enumerated herein, this court concludes that the provisions of Code Ann. § 27-1404 relating to withdrawal of guilty pleas as a matter of right do not apply to guilty pleas tendered in capital cases other than treason or aircraft hijacking in which the State seeks the death penalty.[5/] We hold that a guilty plea, voluntarily and knowingly entered in a capital felony case other than treason or aircraft hijacking wherein the State seeks the death penalty under Ga. Laws 1973, p. 159 et. seq. may not be withdrawn as a matter of right.

9. In his last enumeration of error the appellant contends that the trial court erred in denying appellant's motion for new trial on general grounds and on the grounds previously considered. This enumeration has no merit. Upon review of the transcript and record we find that the verdict is factually substantiated and that the evidence supports such a verdict by a rational trier of fact beyond a reasonable doubt. Jackson v. Virginia, supra.

10. As mandated by the statute, Ga. Laws 1973, pp. 159, 165 (Code Ann. § 27-2537) we have reviewed the transcript and record

5/ Nothing herein should be construed as approval by this court of the Court of Appeals' interpretation of Code Ann. § 27-1404 as permitting withdrawal of a guilty plea after sentence is orally pronounced.

in this case as we have in all prior cases under this statute. We find that the sentence of death was not imposed under the influence of passion, prejudice or any other arbitrary factor.

In reviewing the death penalty in this case, we have considered the cases appealed to this court since January 1, 1970, in which a death or life sentence was imposed. We find the similar cases listed in the appendix support affirmance of the death penalty.

Appellant's sentence of death is not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Judgment affirmed. All the Justices concur, except Hall, J., concurs specially

APPENDIX

1. Henderson v. State, 227 Ga. 68 (179 SE2d 76) (1971
2. Kramer v. State, 230 Ga. 855 (199 SE2d 805) (1973)
3. Floyd v. State, 233 Ga. 280 (210 SE2d 810) (1974)
4. Mitchell v. State, 234 Ga. 160 (214 SE2d 900) (1975)
5. Moore v. State, 240 Ga. 807 (243 SE2d 1) (1978)
6. Westbrook v. State, 242 Ga. 151 (249 SE2d 524) (1978)
7. Burger v. State, 242 Ga. 28 (247 SE2d 834) (1978), aff'd on resentencing _____ Ga. _____ #35709, decided 3/14/80
8. Ruffin v. State, 243 Ga. 95 (252 SE2d 172) (1979)
9. Tucker v. State, 244 Ga. 721 (261 SE2d 635) (1979)
10. Gates v. State, 244 Ga. 587 (261 SE2d 349) (1979)
11. Dampier v. State, _____Ga. _____ #35378, decided 2/20/80

HILL, Justice, concurring.

I concur in the judgment affirming the death penalty on the basis of the aggravating circumstance discussed in division 3 of the opinion, but not on the basis of the aggravating circumstance described in division 2, to wit: the Habersham murder of which the defendant was later acquitted.

In the Supreme Court of Georgia

JUN 24 1980

35701. FAIR v. STATE

ADDENDUM

(a) Subsequent to our decision in this case, but prior to transmittal of the remittitur to the trial court, the Supreme Court of the United States has decided Godfrey v. Georgia, 48 LW 4541 (May 19, 1980). In that the appellant's sentence of death rests partially[1/] upon Ga. Code § 27-2534.1(b)(7), his sentence must be reviewed in light of Godfrey.

Code Ann. § 27-2534.1(b)(7) provides in pertinent part: "The offense of murder. . . was outrageously vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." In Godfrey, the court found that § (b) (7) was unconstitutionally applied in that case. We find material differences between Godfrey and the case under review, which distinguish this murder from the murder in Godfrey and from other "ordinary" murders for which the death penalty is not appropriate.

1/The judge found the existence of two statutory aggravating circumstances, Code Ann. §§ 27-2534.1(b)(2) and 27-2534.1(b)(7). In Godfrey, the court was concerned with a sentence of death resting exclusively on § 27-2534.1(b)(7). Godfrey v. Georgia, 48 LW 4541, n.15. The other statutory aggravating circumstances are more "specific and measurable." Godfrey v. Georgia, 48 LW 4541, 4542, n.2. Therefore, under our decisions, the death penalty, infra, may be upheld upon § 27-2534.1(b)(2). Gates v. State, 244 Ga. 587 (261 SE2d 349) (1979); Burger v. State, 245 Ga. 458 (SE2d) (1980).

In our opinion in this case, we held that the trial court's finding beyond a reasonable doubt that the murder was outrageously and wantonly vile, horrible and inhuman in that it involved depravity of mind on the part of the defendant, was supported by the evidence. That evidence showed that appellant had had no quarrel with his victim. Rather the victim was killed simply because he had witnessed appellant's previous murder and appellant was afraid he would testify against him. While pretending they were still friends, appellant lured the victim into a vulnerable position and then shot him in the head. Aside from laughing during the killing itself, appellant showed no remorse thereafter but instead bragged about the killing and said he would kill the other witnesses when he got out of jail. Appellant's accomplice cut the victim's throat and appellant then burned the body. A defendant who mutilates or seriously disfigures a victim's body after death (cf. Code Ann. § 26-1305), may be found to have a depraved mind and such acts would be sufficient to show depravity of mind of the defendant within the meaning of the statute. (See Hance v. State, Case No. 36012, Decided June 24, 1980, after the main opinion in this case.) Appellant's actions in this case take this murder out of the category of "ordinary murders."

(b) The trial judge also found the existence of statutory aggravating circumstance Code Ann. § 27-2534.1(b)(2) in that the Hall County murder was committed in the course of another capital offense, the Habersham County murder.

Subsequent to our decision in this case, but prior to transmittal of the remittitur to the trial court, the Supreme Court of the United States decided Standefer v. United States, 48 LW 4634 (June 9, 1980). The following language from that case is relevant to our discussion in the main opinion of the effect of appellant's subsequent acquittal of the first murder in Habersham County:

> "This case does no more than manifest the simple, if discomforting, reality that 'different juries [may] reach different results under any criminal statute. That is one of the consequences of our jury system.' Roth v. United States, 354 U. S. 476, 492 (1957). While symmetry of results may be intellectually satisfying, it is not required." 48 LW at 4638.

Judgments of affirmance of the death penalty adhered to. All the Justices concur except Hill, J. who concurs in the judgment and in part (a) of the Addendum.

FC

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-6884

KEITH FAIR,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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IN THE

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NO. 79-6884

KEITH FAIR,

Petitioner,

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ON PETITION FOR WRIT OF CERTIORARI
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BRIEF FOR THE RESPONDENT IN OPPOSITION

The State of Georgia, by and through the Attorney General for the State of Georgia, respectfully requests that this Court deny the petition for writ of certiorari, which seeks review of the Georgia Supreme Court's decision in this case. The April 9, 1980, Slip Opinion from the Georgia Supreme Court and June 24, 1980, addendum thereto accompany this Brief as Respondent's Appendix B.

PART ONE

QUESTIONS PRESENTED

1.

Whether the Georgia Supreme Court's affirmance of the trial court ruling which had denied Petitioner's request to withdraw his guilty plea, operated to deprive the Petitioner of his equal protection or due process rights under the Fourteenth Amendment to the United States Constitution and/or whether said decision violated the United States constitutional provision prohibiting ex post facto laws?

2.

Whether the evidence presented during the Petitioner's sentencing hearing was sufficient to prove an aggravating circumstance under Ga. Code Ann. § 27-2534.1(b)(7) beyond a reasonable doubt so as to justify Petitioner's sentence of death under that Code Section?

3.

Whether or not a second murder, which was proven beyond a reasonable doubt during the sentencing phase of Petitioner's bifurcated guilty plea hearing in this case, may still remain an aggravating circumstance authorizing the death penalty under Ga. Code Ann. § 27-2534.1(b)(2), when the Petitioner was later tried before a jury in another county, and acquitted of said murder?

4.

Whether the sentence review procedure mandated by Georgia's death penalty statute and utilized in this case, is constitutional?

PART TWO

STATEMENT OF THE CASE

A summary of the facts in the instant case is recited in the opinion of the Georgia Supreme Court. Fair v. State, ___Ga.___, ___S.E.2d___ (Slip Opinion, April 9, 1980). A more detailed recital of the facts is as follows:

On August 14, 1979, the Petitioner and his counsel appeared in the Superior Court of Hall County, Georgia, to enter Petitioner's plea of guilty to the murder of Jackie Morris. In an effort to guard the Petitioner's constitutional rights, insuring that the plea was freely and voluntarily entered, with full knowledge of the consequences of said plea, the trial judge meticulously questioned the Petitioner. (T. 5-16).[1/] It was established beyond any doubt that the Petitioner was fully aware that the trial court had the authority under Georgia law to impose the death penalty upon a guilty plea, and that the trial judge was not conscientiously opposed to capital punishment if the circumstances so warranted. (T. 10-13). The Petitioner also indicated his awareness that there was no plea bargain in existence between himself or his attorney and the district attorney relating to the sentence which might be imposed following Petitioner's plea. (T. 11). Knowing that he was leaving his fate in the hands of the trial judge, the Petitioner expressed his desire to enter his plea of guilty. (T. 18-20). In his own words, the Petitioner admitted that he had shot Jackie Morris in the head three times with a .22 caliber pistol. Petitioner's only explanation was that they were drunk and had a little argument. (T. 15).

Following the acceptance of Petitioner's guilty plea, the trial court heard testimony from twenty-one witnesses on the issue of punishment. The testimony was extensive covering three days and approximately 400 pages in the transcript. The testimony

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1/ References to the pagination of the trial transcript shall be referred to in this brief as (T. ____). References to the official record from the Hall Superior Court shall be referred to as (R. _____).

established overwhelmingly, and beyond any scintilla of doubt, that the murder of Jackie Morris resulted from Petitioner's attempts to conceal another murder which he had committed earlier that same night in Habersham County, Georgia - the murder of Edmond Hoyt Turner, alias "Beetle" Turner.

At this juncture it should be noted that at the time of the Petitioner's plea, he stood accused of murdering both Jackie Morris in Hall County, Georgia and "Beetle" Turner in Habersham County, Georgia. Hall and Habersham Counties are in different judicial circuits, and are served by different district attorneys. Although Petitioner stood indicted in Habersham County, that case had not been called to trial at the time of Petitioner's guilty plea in Hall County. Prior to the sentencing phase of Petitioner's bifurcated guilty plea proceeding, Petitioner's attorneys were aware that the Hall County district attorney in this case, intended to use evidence of the Habersham County murder as an aggravating circumstance in support of the death penalty. (R. 32).

The State's evidence during the sentencing phase showed that the Petitioner and several other individuals had congregated at the home of Dexter Thomas on the evening of May 8, 1977. Present were the Petitioner, Becky Nations (Petitioner's girlfriend), Jackie Morris, Sherill Land, and Dexter Thomas. (T. 91-92, 163-165, 192). "Beetle" Turner (the victim in the Habersham County murder) arrived a short time after the others. Witnesses stated that Turner apparently had recently been released from jail, and was angry at an individual named Morgan Whitlock, because Whitlock had been instrumental in Turner's being jailed. Earlier on May 8, 1977, Turner had been in a confrontation with Whitlock, had threatened him, and told Whitlock that he would return that evening. (T. 96-98).

Eventually, "Beetle" Turner, Jackie Morris, Dexter Thomas and the Petitioner left the Thomas house. (T. 194). Evidence was presented which showed that Turner gave the Petitioner a pistol, and had offered him some money in exchange for his help in burning Whitlock's trailer. Upon arriving at the trailer, the group found that Whitlock was absent, and the Petitioner and Jackie Morris then set the trailer on fire. (T. 103, 199).

After leaving Whitlock's place, the Petitioner told Turner that he wanted his money. (T. 199). Turner said he did not have it at that time, but he would cash a check. (T. 199). Melody Tethrow, who worked at a local country store, confirmed that Turner had requested that she cash a $200.00 check, but she had only been able to cash a $100.00 check. (T. 87).

Fair and Turner continued to argue about the money as the group traveled in Morris' automobile. Fair was driving. The argument climaxed when, after stopping the car, Fair shot Turner in the face without any warning. As described by eyewitness, Dexter Thomas, Turner and Fair had been arguing about the money and finally Turner stated, "I'll get you some more money after a while." Fair responded, "I'm getting tired of hearing your damn mouth run, you won't pay your debts or nothing . . . I'll teach you." At this point, the Petitioner drew the pistol, reached through the automobile window where Turner was sitting, and fired point blank into Turner's face. Fair then reached in, grabbed Turner by the hair, pulled him out onto the ground, laughed and again shot him in the head. (T. 201-202).

Testimony from a medical examiner and from a ballistics expert confirmed that the pistol was fired from between two and six inches from Turner's face. (T. 114, 117, 156-158).

After Turner had been shot, Fair directed the other two occupants of the vehicle to place Turner's body into the trunk of Morris' automobile. (T. 203). Petitioner now faced the problem of disposing of Turner's body, and doing something about Morris' bloodstained automobile. The trio returned to Thomas' house where they changed clothes. (T. 203-204, 249). At the Thomas' residence, the Petitioner, Morris and Thomas confided in Becky Nations and Sherill Land about Fair's shooting of Thomas. (T. 167, 250).

After Fair changed clothes, he and Becky Nations left in their car, while Dexter Thomas and Sherill Land drove "Bettle" Turner's truck. Jackie Morris now drove his bloodstained Mustang with Turner's body still hidden in the trunk. The plan was to dispose of Turner's body in a nearby lake. (T. 250-252).

Upon arriving at the lake, Turner's body was loaded onto his truck at the direction of the Petitioner, and the truck was driven into the water. (T. 167-168, 206-207, 252-253).

After Turner's body was disposed of, the five individuals headed towards Gainesville, Georgia. Dexter Thomas rode with Fair and Becky Nations, while Sherill Land rode with Jackie Morris in his Mustang. (T. 207). On the way to Gainesville, Fair asked Thomas, "Reckon what I ought to do with Jackie [Morris]." (T. 209). Thomas claimed to have suggested nothing, since Morris was going to burn his automobile. (T. 209). Fair, however, had other plans.

After arriving in Gainesville, Georgia, Fair left Thomas, Morris and Sherill Land at a Huddle House restaurant, while he and Becky Nations left, supposedly to get another car because his was too loud. (T. 207, 210). Fair and Becky drove to a mobile home owned by Bradley Highfield. Fair admitted that he had blood on his shirt upon arriving at Highfield's trailer. (T. 439).

Highfield also testified that Fair had blood on him when he arrived at the trailer, and stated he was in a "little trouble," and needed a ride. (T. 288-290).

Eventually, Fair, Highfield and Nations left Highfield's mobile home. Fair was now driving Highfield's Volkswagon. Nations was in the back seat, and heard part of a conversation wherein Fair and Highfield discussed that Jackie Morris would have to be killed because Morris "was a rat in prison." (T. 171). After the shooting of Morris, Sherill Land also heard Fair remark that Morris had been a "ratting S.O.B. on the chain gang." (T. 271-272).

When Fair and Nations had not returned to the Huddle House, Morris, Thomas and Sherill Land left, and headed towards home. (T. 210). Fair, Highfield and Nations soon caught up with the other three on the highway. (T. 210-211). With Fair leading the way in Highfield's Volkswagon, the group traveled over some dirt roads, and finally stopped supposedly, to burn Morris' automobile. (T. 256-257). It was at this location that Fair finally murdered Jackie Morris. (T. 211-215, 257-260, 296, 412-418).

While Morris was working at removing the rear tire of his automobile, in an attempt to make the car look like it had been stripped, the Petitioner pulled his pistol, and shot the kneeling Morris in the head three times. (T. 15, 259). Although Fair contended that the shooting was not planned, and that he and Morris had been arguing, (T. 414); according to witness Sherill Land, who was standing nearby, "They wasn't even fussing." (T. 272). After the Petitioner shot Morris, he laughed and said something about Morris being a rat, and that Morris had pulled a knife on the Petitioner when he was thirteen years old. (T. 215, 272). There was also evidence which tended to show that following the shots, Thomas participated by cutting Morris' throat with a knife. (T. 339, 418, 421). The Petitioner and Thomas then put

Morris' body in the automobile, and set it on fire. (T. 213-217, 258-259).

Morris' burnt car, and the thirty-nine inches of his charred remains were found the next morning. (T. 47, 57, 58, 126). The next day, "Beetle" Turner and his truck were found at the lake. (T. 73-76). A ballistics expert testified that the bullets taken from Morris, Turner, and from the gas tank of Morris' automobile, were probably all fired from the same weapon. (T. 157-158).

Although the Petitioner contended that the shooting of Morris occurred as the result of an argument, the State's evidence from several witnesses, as previously pointed out, showed that the elimination of Morris was preplanned, because of Morris' propensity to talk. At trial the Petitioner contended that he was sorry for his deed, saying that, "Nobody deserved nothing like that." (T. 424). The State's evidence established that Fair's sorrow was newly acquired.

After Fair's arrest, he escaped from the Forsyth County jail. (T. 423-325, 357-358). The State called as witnesses, some of the men who had been Fair's former fellow inmates at the jail. One individual stated that Fair showed him the autopsy report on Jackie Morris. Fair then discussed the killing and told about a man with, "lead in his head," that had been driven into the lake. (T. 329-332). Fair also told that inmate that he planned to do away with the other witnesses. (T. 331-333). Without indicating any remorse, Fair appeared to be trying to impress the other inmates. (T. 336).

Another inmate who had been in Forsyth County jail with Fair, also stated that Fair had commented about there only being thirty-nine inches left of Morris's body. Fair also

told this inmate that he was not sorry, and that he had lost no sleep over it. (T. 339-341).

An individual who had escaped from the jail with Fair stated that Fair had also talked to him about the thirty-nine inch remains of Morris, and told about the killing and the disposal of the bodies of both Morris and Turner. Fair admitted killing both men. (T. 357-360). While on escape Fair made a phone call and stated that the victims, "deserved it." (T. 361). Fair admitted talking to these people, but denied making many of the statements attributed to him. (T. 434, 437).

After hearing the evidence and deliberating overnight, the trial judge held that the aggravating circumstances were supported by the evidence beyond a reasonable doubt thus justifying the imposition of the death penalty. The judge found that the murder of Jackie Morris was committed while the Petitioner was engaged in the commission of another capital felony, to wit: the murder of "Beetle" Turner. The judge also found that the murder of Jackie Morris had been outrageously and wantonly vile, horrible and inhuman in that it involved depravity of mind on the part of the Petitioner. (T. 492; R. 98).

Immediately following the court's oral announcement of the sentence, Petitioner's defense counsel orally attempted to withdraw the Petitioner's plea of guilty. (T. 484). After extensive argument, the trial judge denied the request for withdrawal. (T. 491).

It should also be noted at this point, that approximately three months after Petitioner's conviction and sentence in Hall County for the murder of Jackie Morris, he was tried in the Superior Court of Habersham County for the murder of "Beetle" Turner, and was subsequently acquitted. Although Petitioner states in his brief that virtually the same evidence was presented before the jury in Habersham County, as was presented to the trial judge during

sentencing in Hall County, the Habersham County transcript has not been made a part of the record in this case. It is clear, however, that the Habersham case was tried before a different trier of fact, with a different prosecutor, and with a different defense attorney. It cannot be assumed that all of the evidence was the same at both proceedings.

From the affirmance of Petitioner's Hall County conviction and sentence by the Georgia Supreme Court, he now brings this petition for a writ of certiorari.

PART THREE

REASONS FOR NOT GRANTING THE WRIT

I. SINCE THE PETITIONER HAS FAILED TO PROPERLY RAISE, IN THE STATE COURT BELOW, THE FEDERAL QUESTIONS WHICH HE NOW RAISES UNDER HIS FIRST TWO ARGUMENTS URGING ISSUANCE OF THE WRIT, THIS COURT SHOULD NOT REVIEW THOSE ISSUES ON APPEAL. ALTERNATIVELY, THE GEORGIA SUPREME COURT PROPERLY RULED THAT THE PETITIONER HAD NO RIGHT TO WITHDRAW HIS GUILTY PLEA AFTER ORAL SENTENCE HAD BEEN PRONOUNCED.

Petitioner's first two arguments urging issuance of the writ in the instant case, contend that the Georgia Supreme Court's decision, affirming the trial court's refusal to permit the Petitioner to withdraw his guilty plea following the oral pronouncement of his sentence, operated to deprive the Petitioner of his rights to equal protection and due process under the Fourteenth Amendment to the United States Constitution, and further operated as a violation of the constitutional prohibition against ex post facto laws.

Respondent initially submits that this Court should decline to issue the writ based upon the above arguments, because the federal constitutional questions were not properly raised before, or considered by, the Georgia Supreme Court.

Petitioner's arguments in the Georgia Supreme Court pertaining to the trial court's refusal to permit him to withdraw his guilty plea, focused upon the prior interpretations of Ga. Code Ann. § 27-1404, primarily by the Georgia Court of Appeals, and made no

specific claim of any equal protection or due process violation, or a violation of the prohibition against the passage of ex post facto laws. There was no specific reference in the Georgia Supreme Court to any federal constitutional provisions. At most, Petitioner argued that his vested or substantive procedural rights would be violated if the court applied its ruling retroactively (Appendix A, Appellant's Brief, p. 33); however, Respondent submits the absence of any citations to federal statutory, constitutional, or case authority rendered this argument insufficient to raise the federal ex post facto or due process issue before the Georgia court.

This Court has consistently ruled that federal constitutional issues raised for the first time on an appeal from a state court decision will not be reviewed. Cardinale v. Louisiana, 394 U.S. 437, 89 S.Ct. 1163, 22 L.Ed.2d 398 (1969); Tacon v. Arizona, 410 U.S. 351, 93 S.Ct. 998, 35 L.Ed.2d 346 (1973); also see, 28 U.S.C. § 1257. Thus, since the federal questions have not been properly raised, preserved or passed upon in the State Court below this Court should decline to accept jurisdiction to review these issues.

Alternatively, Respondent submits that the justification for this Court's refusal to grant the writ of certiorari to review the issues raised under Appellant's first two arguments, may rest upon this Court's finding that the Georgia Supreme Court properly affirmed the trial court's refusal to permit the Petitioner to withdraw his guilty plea following the trial court's oral pronouncement of the sentence. Petitioner has not been denied of equal protection or due process under the Fourteenth Amendment, and the Georgia Supreme Court decision does not contravene the United States constitutional prohibition under Art. I, § 10, Clause 1, [2/]

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2 / It appears that there are two constitutional provisions prohibiting the passage of ex post facto laws; however, Art. I, § 9, Clause 3, applies solely to the federal government. See, Barron v. Baltimore, 32 U.S. 243, 8 L.Ed. 672 (1833). Art. I, § 10, Clause 1, states in pertinent part that, "no state shall . . . pass any . . . ex post facto law, . . ."

which prohibits the passage of ex post facto laws.

As noted in the prior statement of facts, the Petitioner attempted to withdraw his plea of guilty following the trial court's oral announcement of the death sentence, but prior to the trial judge signing the sentence and filing it with the clerk of the court. Petitioner tendered his withdrawal based upon Ga. Code Ann. § 27-1404 which reads in pertinen part as follows:

> ". . . If he shall plead 'guilty' such plea shall be immediately recorded on the minutes of the court by the clerk, together with the arraignment; and the court shall pronounce upon such prisoner the judgment of the law in the same manner as if he had been convicted of the offense by the verdict of a jury; but, at any time before judgment is pronounced, the prisoner may withdraw the plea of 'guilty,' and plead 'not guilty,' and such former plea shall not be given in evidence against him on his trial."

In its opinion in this case, the Georgia Supreme Court cited its prior holding in Smith v. State, 231 Ga. 23, 200 S.E.2d 119 (1973), which recognized that,"[t]he purpose of the withdrawal provision of Code Ann. § 27-1404 is to provide a necessary part of the plea bargaining procedure . . ." Fair v. State, Slip Op. at p. 16. The court properly rationalized that when a guilty plea is entered in a capital case, and it is clear that the State is seeking the death penalty the withdrawal provisions of Ga. Code Ann. § 27-1404 have no rational purpose, and in effect would operate

to completely frustrate Ga. Code Ann. § 27-2528, which specifically authorizes a trial judge to impose the death sentence upon a plea of guilty.

Although the Petitioner argues that the Georgia Supreme Court's opinion modified or contravenes at least thirty-five years of precedent interpreting Ga. Code Ann. § 27-1404; nevertheless, Petitioner cites no cases, and Respondent also has found none, wherein the Georgia Supreme Court has precisely considered the issue as to whether or not a capital defendant, who has pled guilty, has the right under Georgia law to withdraw that guilty plea, after it has been accepted by the trial court and said court has orally announced it was going to impose the death sentence.[3/]

Also, although the Petitioner argues that he had an established right to withdraw his plea under Ga. Code Ann. § 27-1404, it is clear that the Petitioner was relying upon the opinions from the Georgia Court of Appeals, which did not deal with capital crimes. The Georgia Court of Appeals has never interpreted the Code Section in a death penalty case, because all such appeals are directed to the Georgia Supreme Court. Ga. Const., Art. VI, § II, Para, IV; Ga. Code Ann. § 2-3104. Thus, as the Georgia Supreme Court noted, the question before it was clearly one of first impression. Not only had the Georgia Supreme Court never before interpreted the withdrawal provisions of Ga. Code Ann. § 27-1404 in light of Georgia's statutory scheme for the imposition of the death penalty, the Court has never specifically addressed itself to the intepretation of the term, "pronouncement," as it is used in the Code Section. In the instant case the Court noted that nothing in its

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3/ There have been only three other cases since the passage of Georgia's death penalty statute (Ga. Laws 1973, p. 159, et. seq.) which have resulted in the imposition of the death penalty following a plea of guilty. In none of these cases did the defendant attempt to withdraw his plea following oral pronouncement of sentence. See, Hooks v. State, 233 Ga. 149, 210 S.E.2d 688 (1974), sentence vacated on other grounds, 433 U.S. 917 (1977); Moore v. State, 233 Ga. 861, 213 S.E.2d 929 (1975), cert. den., 428 U.S. 910 (1976); Mitchell v. State, 234 Ga. 160, 214 S.E.2d 900 (1975), cert. den., 428 U.S. 910 (1976).

opinion" . . . should be construed as approval by this Court [the Georgia Supreme Court] of the Court of Appeals interpretation of Code Ann. § 27-1404 as permitting withdrawal of a guilty plea after sentence is orally pronounced." Fair v. State, Slip Op. at p. 18, fn. 5.

Contary to the Petitioner's arguments, it does not appear that the Georgia Supreme Court would distinguish between capital and non-capital defendants in cases which involve a non-negotiated plea. The Georgia Supreme Court has never ruled that non-capital defendants, in a non-negotiated plea situation such as the Petitioner's have an absolute right to withdraw a guilty plea following oral announcement of the sentence by the trial court. Respondent submits that any decisions by the Georgia Court of Appeals to the contrary are erroneous. The Georgia Court of Appeals decisions interpreting the term, "pronouncement," are contra to the clear language in the statute.

It should be noted that in the instant case, the Petitioner was thoroughly questioned by the trial court prior to the trial judge's acceptance of the guilty plea. The judge informed the Petitioner that he was not conscientiously opposed to capital punishment, and that if the circumstances warranted, he might impose the death penalty. Knowing this, the Petitioner still chose to plead guilty, and in his own words, admitted shooting Jackie Morris. Two days of extensive presentence hearings followed. The Petitioner made no attempt to withdraw his plea even after hearing the voluminous amount of evidence which the State had amassed against him. No attempt was made to withdraw the plea until immediately after the judge orally announced his sentence in open court.

The decisions of this Court have made it clear that the ex post facto clause of Art. I, § 10, Clause 1, of the United States Constitution is a limitation upon legislative action and does not apply to judicial decisions. Ross v. Oregon, 227 U.S. 150, 33 S.Ct. 220, 57 L.Ed. 458 (1913); Frank v. Mangum, 237 U.S. 309, 35 S.Ct. 582, 59 L.Ed. 969 (1915); Marks v. U.S., 430 U.S. 188, 191, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977). However, this Court has also held that judicial decisions may operate in an ex post facto fashion so as to deprive a criminal defendant of his due process rights. See, Bouie v. Columbia, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed. 894 (1964).

However, in both Bouie, supra and in Bunkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (1930), cited by the Petitioner, the judicial decisions of the state supreme courts had been clearly contra to said state supreme courts' prior decisions on the same issue. See, Bouie at p. 356, Bukerhoff at p. 676.

In the instant case, the Georgia Supreme Court has never addressed the precise issue which was before it, and as noted earlier, has never specifically interpreted the statutory terminology in Ga. Code Ann. § 27-1404. The question here was one of state statutory interpretation which had never been addressed by the highest court in the State of Georgia. Since the Georgia Supreme Court had never ruled upon the procedural or statutory question in issue, the court's decision in this case did not deprive the Petitioner of an established, procedural right.

In conclusion, since the Petitioner did not properly raise the aforesaid issues in the Georgia Supreme Court, and alternatively, since none of his constitutional rights have been violated by the Georgia Supreme Court's interpretation of Ga. Code Ann. § 27-1404 this Court should decline to grant the writ of certiorari to review the issues raised in Petitioner's first two arguments.

II. THE GEORGIA SUPREME COURT PROPERLY PERFORMED ITS REQUIRED DUTY TO REVIEW ALL DEATH PENALTIES IMPOSED UNDER THE GEORGIA CAPITAL PUNISHMENT STATUTORY SCHEME, AND PROPERLY AFFIRMED THE TRIAL JUDGE'S FINDING IN THE INSTANT CASE THAT THE EVIDENCE SHOWED SUFFICIENT STATUTORY AGGRAVATING CIRCUMSTANCES UNDER GA. CODE ANN. § 27-2534.1(b)(7) TO WARRANT THE IMPOSITION OF THE DEATH PENALTY UNDER THAT CODE SECTION.

The Petitioner contends, under his third argument that his death penalty may not be supported by the trial court's finding of an aggravating circumstance under Ga. Code Ann. § 27-2534.1(b)(7), because there was no finding of an aggravated battery or torture. As noted in Part Two of this Brief, two statutory aggravating circumstances were found to exist by the trial judge at the conclusion of the sentencing phase of Petitioner's guilty plea hearing. One of these aggravating circumstances was that the murder of Jackie Morris had been vile, horrible or inhuman in that it involved depravity of mind on the part of the Petitioner, Keith Fair. (R. 98).

As this Court is well aware, Georgia's seventh aggravating circumstance authorizes the jury to impose the death penalty when it finds beyond a reasonable doubt that: "The offense of murder . . . was outrageously or wantonly vile, horrible or inhuman

in that it involved torture, depravity of mind, or an aggravated battery to the victim." Ga. Code Ann. § 27-2534.1(b)(7). The Georgia Supreme Court has recognized its obligation under the Georgia statutory provisions which mandate that it thoroughly review death sentences,[4/] and specifically with regard to Ga. Code Ann. § 27-2534.1(b)(7), it has stated that it has no intention of permitting that Code Section to become a "catchall" for cases simply because no other statutory aggravating circumstance has been raised by the evidence. Harris v. State, 237 Ga. 718, 730, 230 S.E.2d 1 (1976), cert. den., 431 U.S. 933 (1977), rehng. den., 434 U.S. 822 (1977), modified as to sentence only, Harris v. Hopper, 243 Ga. 244, ___S.E.2d ___ (1979). The Georgia court further stated in Harris, its intention to restrict its approval of death sentences supported by Code § 27-2534.1(b)(7) to those cases which lie not on the periphery of the statutory boundaries, but to only approve those sentences which are so outrageous and vile so as to lie at the core of the statutory intent. As the prior statement of facts amply demonstrates, the facts surrounding the murder of Jackie Morris fall within the purview of Code § 27-2534.1(b)(7) in that they demonstrate beyond all doubt the wanton, vile and inhuman nature of the murder and the depravity of mind on the part of the Petitioner.

4/ Under Ga. Code Ann. § 27-2537(c), the Georgia Supreme Court must review all death penalty cases to determine: "(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and (2) Whether in cases other than treason or aircraft highjacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Section 27-2534.1(b), and (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

In reviewing this case, the Georgia Supreme Court specifically interpreted Code § 27-2534.1(b)(7) in light of Petitioner's allegation that the death penalty could not be supported without a finding of torture or an aggravated battery. The Georgia court affirmed that, "[i]t is not required that a trier of fact find the existence of each disjunctive phrase of the statute, only that at least one phrase of the first clause of the statute exists due to the existence of at least one phrase of the second clause of the statute." Fair v. State, Slip Op., at p. 8. The court also noted that it had upheld an identical finding of this statutory aggravating circumstance in Corn v. State, 240 Ga. 130, 240 S.E.2d 694 (1977). It is axiomatic that this Court will not construe a state statute contrary to the construction given it by the highest court of said state. O'Brien v. Skinner, 414 U.S. 531, 94 S.Ct. 740, 38 L.Ed.2d 702 (1974); Memorial Hospital v. Maricopa County, 415 U.S. 250, 256, 94 S.Ct. 1076, 39 L.Ed.2d 306 (1974).

Contrary to the position of the Petitioner, this Court's decision in Godfrey v. Georgia, ___U.S.___, 27 Cr. L. Rptr. 3115 (May 19, 1980), does not require a finding of torture or aggravated battery before the death penalty may be imposed. In fact, the plurality opinion specifically reviewed the evidence to determine whether Godfrey's death sentence could have been supported by a finding that the murders had been outrageously or wantonly vile, horrible or inhuman in that they involved depravity of mind. This Court found that the crimes in Godfrey could not have been said to have reflected a consciousness materially more "depraved" than that of any person guilty of murder. The victims in Godfrey were killed instantly, they were members of the defendant's family who had caused him extreme emotional trauma, and shortly after the killings, the defendant Godfrey acknowledged his responsibility

in the heinous nature of the crimes. Godfrey, supra, 27 Cr. L. Rptr. at p. 3119.

In an addendum opinion the Georgia Supreme Court specifically reviewed Petitioner's death sentence in light of Godfrey. The Georgia court noted, and it is also apparent from the aforesaid statement of facts, that there are numerous distinguishing factors between Godfrey and the instant case. The victim in this case, Jackie Morris, was killed by the Petitioner as a result of the Petitioner's cold blooded attempt to cover up his previous murder of "Beetle" Turner. Aside from shooting Morris in the head at point blank range, the Petitioner's accomplice cut the victim's throat, and mutilated his body by burning it. The court specifically noted that, "Aside from laughing during the killing itself, [Petitioner] showed no remorse thereafter but instead bragged about the killing and said he would kill the other witnesses when he got out of jail." Fair v. State, Addendum Slip Op. at p. 2 .

In Godfrey, the jury in its written findings, stated as the only aggravating circumstance supporting the death penalty, that "the offense of murder was outrageously or wantonly vile, horrible or inhuman." In the instant case, the trial judge found the additional factor that the murder involved depravity of mind. The Petitioner's extended argument does not take into consideration the clear, disjunctive phraseology of the statute.

Alternatively, even if this Court should hold that the trial judge's finding of an aggravating circumstance under Ga. Code Ann. § 27-2534.1(b)(7) is invalidated, the trial judge also found a second aggravating circumstance under subsection (b)(2) of the aforesaid Code Section. The trial judge found that the

murder of Jackie Morris had occurred while the Petitioner was in the course of another capital felony, to wit: the murder of "Beetle" Turner. The invalidation of one statutory aggravating circumstance under the Georgia death penalty statute will not preclude the imposition of said death penalty if the trier of fact has found sufficient evidence to support another statutory aggravating circumstance. Stevens v. State, 237 Ga. 259, 261-262, 227 S.E.2d 261 (1976), cert. den., 429 U.S. 1067 (1976).

Thus, since there was ample evidence to support the trial judge's finding of an aggravating circumstance under Ga. Code Ann. § 27-2534.1(b)(7), and since there was a finding of an additional aggravating circumstance under subsection (b)(2) of said statute, this Court should not grant the writ of certiorari to review the issue raised under Petitioner's third argument.

III. THE GEORGIA SUPREME COURT PROPERLY PERFORMED ITS REQUIRED DUTY TO REVIEW ALL DEATH PENALTIES IMPOSED UNDER THE GEORGIA CAPITAL PUNISHMENT STATUTORY SCHEME, AND PROPERLY AFFIRMED THE TRIAL JUDGE'S FINDING IN THE INSTANT CASE, THAT THE EVIDENCE SHOWED SUFFICIENT STATUTORY AGGRAVATING CIRCUMSTANCES UNDER GA. CODE ANN. § 27-2534.1(b)(2) TO WARRANT THE IMPOSITION OF THE DEATH SENTENCE.

Petitioner's fourth argument contends that his later acquittal in Habersham County, on the murder of "Beetle" Turner, should require that his death sentence under Ga. Code Ann. § 27-2534.1(b)(2), be vacated. As noted in the statement of facts, there was an overwhelming amount of evidence presented to the trial judge in the instant case, which amply proved beyond all reasonable doubt that the murder of Morris had been perpetrated by the Petitioner to cover his prior murder of "Beetle" Turner. The law is clear in Georgia that Ga. Code Ann. § 27-2534.1(b)(2) does not require a conviction before the trier of fact may find the supporting additional capital felony as an aggravating circumstance authorizing the death penalty. Fair v. State, supra, Slip Op. at p. 4; Collier v. State, 244 Ga. 553, 261 S.E.2d 364 (1979); Hooks v. State, 233 Ga. 149(5) (1974), sentence vacated on other grounds, 433 U.S. 917 (1977), sentence modified, 239 Ga. 408 (1977).

This Court has recognized that during sentence determination in a capital felony case, the trier of fact should consider a broad spectrum of circumstances including such things as the character of the accused, his past record and all of the circumstances

surrounding the particular offense. Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 2964-65, 57 L.Ed. 973 (1978); Woodson v. North Carolina, 428 U.S. 280, 284, 96 S.Ct. 2976, 2981, 49 L.Ed.2d 944 (1976).

In the instant case, the Petitioner was charged with two separate murders in two separate counties, and was tried before two distinct bodies. The trial judge in Hall County, in finding beyond a reasonable doubt that the Petitioner had committed the murder of "Beetle" Turner, had the opportunity to consider evidence which may not have necessarily been admissible during the guilt-innocence phase of the Petitioner's trial before a jury in Habersham County. The record before this Court does not reflect what evidence was presented to the Habersham County jury which subsequently acquitted the Appellant of the murder of "Beetle" Turner. Additionally, Petitioner's acquittal in Habersham County only demonstrates that the prosecutor in that case failed to prove beyond a reasonable doubt that Fair had murdered Turner. It does not necessarily follow that such a deficiency in proof existed in Hall County, and to the contrary, a review of the record shows an overwhelming amount of evidence supporting Petitioner's guilt on both murders. In its addendum opinion on June 24, 1980, the Georgia Supreme Court referred to the recent decision of this Court in Standefer v. United States, 48 U.S.L.W. 4634 (June 9, 1980), and the following language which is relevant to this case:

> "This case does no more than manifest the simple, if discomforting, reality that 'different juries [may] reach different results under any criminal statute. That is one of the consequences of our jury system.' Roth v. United States, 354 U.S. 476, 492 (1957). While symmetry of

results may be intellectually satisfying, it is not required." Standefer, at p. 4638.

Petitioner's reliance upon Cole v. Arkansas, 333 U.S. 196, 68 S.Ct. 514, 92 L.Ed. 644 (1948) and Presnell v. Georgia, 439 U.S. 14, 99 S.Ct. 235, 58 L.Ed.2d 207 (1978), for the proposition that the murder of Turner could not be utilized to aggravate the murder of Morris, is clearly misplaced. In Cole, a defendant had been charged by information with the violation of a specific Code Section, and likewise was convicted of violating that same Code Section. On direct appeal the Arkansas Supreme Court affirmed the conviction as though the defendant had been tried and convicted for violating a completely different Code Section. This Court found such an affirmance by the Arkansas Supreme Court had violated the defendant's right to due process. In Presnell, the Georgia Supreme Court had affirmed the appellant's conviction for kidnapping with bodily injury, by substituing forcible rape in place of aggravated sodomy as the supporting bodily injury. Although the jury in Presnell had not convicted the appellant of forcible rape; nevertheless, the Georgia court had found sufficient evidence in the record to support such a finding. The Georgia Supreme Court then utilized this same offense (kidnapping with bodily injury, to wit: forcible rape) as an aggravating circumstance to support Presnell's death penalty for the offense of murder.

The holding in Presnell v. Georgia, supra, was that notwithstanding evidence in the record that a forcible rape had been committed, the Georgia Supreme Court could not substitute forcible rape for aggravated sodomy as the bodily injury in order to sustain Presnell's conviction for kidnapping with bodily injury or to uphold

the finding of an aggravating circumstance supporting the death penalty.

Cole and Presnell are inapposite, because in the instant case, the Georgia Supreme Court did not substitute any finding which was not made by the trial judge, who was the trier of fact. To the contrary, the Court stated the judge's findings met the standard of proof as set out in Jackson v. Virginia, ___U.S.___, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Fair v. State, Slip Op. at p. 7. Thus, since Petitioner's acquittal in Habersham County, simply had no bearing on the evidence which had been previously presented to the trial judge during the sentenceing phase of Petitioner's guilty plea hearing in Hall County, this Court should find that there is no merit to Petitioner's fourth argument.

IV. GEORGIA'S STATUTORY PROVISIONS FOR THE IMPLEMENTATION OF THE DEATH PENALTY ARE CONSTITUTIONALLY SUFFICIENT ON THEIR FACE, AND HAVE BEEN PROPERLY APPLIED IN THIS CASE.

Under Petitioner's final argument he contends that his Eighth and Fourteenth Amendment rights under the United States Constitution have been violated as a result of the application of Georgia's death penalty procedures in the instant case. This Court approved Georgia's death penalty statute in the landmark case of Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). As noted earlier, the Georgia sentence review procedure is found in Ga. Code Ann. § 27-2537. Subsection (a) requires the Georgia Supreme Court to look for three sources of information in reviewing the death sentence of a convicted felon: the trial record and transcript, the clerk's notice, and the report of the trial court. Subsection (c) then sets out a three-step procedure by which the Court is to examine information at its disposal in evaluating the sentence.

In the first step of the review, the Court must determine whether the death penalty was imposed under the influence of "passion, prejudice, or other arbitrary factors." Such an analysis is intended to discern whether the atmosphere of the trial colored the jury's deliberations so as to make the ultimate sentence arbitrary and capricious.

In the second step of the analysis under subsection (c) the Georgia Supreme Court must determine whether there was sufficient evidence to support the jury's finding of the existence of a statutory aggravating circumstance. The standard of review at this stage is analogous to that mandated by this Court in Jackson v. Virginia, ___U.S.___, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), that there must be

sufficient evidence to convince a rational trier of fact that an aggravating circumstance existed beyond a reasonable doubt. As noted in the previous sections, such evidence existed in this case.

In the third and final step of a sentence review, the Georgia Supreme Court must determine whether the death sentence is "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." At this stage, the Court must conduct an independent evaluation of the evidence to determine whether, on the basis of clear precedent, this defendant's sentence was excessive or disproportionate. In Moore v. State, 233 Ga. 861, 863, 213 S.E.2d 829 (1975), cert. den., 428 U.S. 910 (1976), the Georgia Supreme Court stated what it felt to be its duty under this last portion of the appellate review in a death penalty case. The Court stated,

> "As we view the court's duty in light of the Furman and Jackson [5/] cases and the statutory provisions designed by the Georgia Legislature to meet the objections of those cases, this Court is not required to determine that less than a death sentence was never imposed in a case with some similar characteristics. On the contrary, we view it to be in our duty under the similarity standard to assure that no death sentence is affirmed

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5/ Furman v. Georgia and Jackson v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

> unless in similar cases throughout the State the death penalty has been imposed generally and not 'wantonly and freakishly imposed' as stated by Justice Stewart in his concurring opinion in the Furman and Jackson cases (408 U.S. 238, 310), supra. We are endeavoring to do our duty under the standards provided." Id. at pp. 863-864. [Footnote added].

In the instant case, the Georgia Supreme Court concluded that Petitioner's death sentence was neither excessive nor disproportionate to the penalty imposed in similar cases considering both the crime and the defendant. Fair v. State, Slip Op. at p. 19. Petitioner's allegation that the Georgia Supreme Court compares death cases only with those other cases in which a death sentence has been imposed, is clearly erroneous in light of the clear language of the Georgia court which states that in reviewing Petitioner's death penalty in this case, the Court has considered other capital cases appealed to said Court and in which either life or death sentences have been imposed. Id. There is no mandate under the statute which requires the Georgia Supreme Court to submit written findings which list the factors which said Court utilizes in its comparison of cases.

Petitioner appears to allege that since neither the trial court or the Georgia Supreme Court had before it the record of Petitioner's trial in Habersham County, a meaningful review of Petitioner's death penalty could not be accomplished. This argument fails to take into consideration the irrelevant nature of the Petitioner's latter acquittal. Said acquittal was not a declaration of the Petitioner's innocence, but was simply a finding by the jury that the prosecutor in Habersham County failed to prove, in that proceeding, the Petitioner's guilt beyond a reasonable doubt.

There are numerous factors which may have resulted in that finding; however, in this case from Hall County Petitioner's guilt in both the Morris and Turner murders was established by overwhelming evidence.

Since it is clear that in the instant case, the statutorily mandated procedures were complied with, and that none of the Petitioner's statutory or constitutional rights have been violated, this Court should not grant certiorari to review the issues raised in Petitioner's final argument.

CONCLUSION

For all of the above and foregoing reasons, Respondent respectfully requests this Court to deny the petition for a writ of certiorari filed on behalf of Keith Fair.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John C. Walden, Attorney of Record for the Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief for Respondent in Opposition and attached Appendices upon Petitioner's counsel by depositiong a copy of same in the United States mail with adequate postage attached and properly addressed to:

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This 5th day of August, 1980.

JOHN C. WALDEN